Y4.Ed8/1:99-68

HEARINGS ON COMPENSATION FOR OCCUPATIONAL DISEASES

M-140

HEARINGS

ORIGINAL

BEFORE THE

SUBCOMMITTEE ON LABOR STANDARDS

OF THE

COMMITTEE ON EDUCATION AND LABOR
HOUSE OF REPRESENTATIVES

NINETY-NINTH CONGRESS

COMPLETED
498

FIRST SESSION

ON

H.R. 1626

TO PROVIDE PROMPT, EXCLUSIVE, AND EQUITABLE COMPENSATION, AS A SUBSTITUTE FOR INADEQUATE TORT REMEDIES, FOR DISABILITIES OR DEATHS RESULTING FROM OCCUPATIONAL EXPOSURE TO ASBESTOS; AND FOR OTHER PURPOSES

AND

H.R. 3090

TO PROVIDE FOR THE COMPENSATION OF INDIVIDUALS WHO ARE DISABLED AS A RESULT OF OCCUPATIONAL EXPOSURE TO TOXIC SUBSTANCES AND PROCESSES TO REGULARIZE THE FAIR, ADEQUATE, AND EQUITABLE COMPENSATION OF CERTAIN OCCUPATIONAL DISEASE VICTIMS, AND FOR OTHER PURPOSES

HEARINGS HELD IN WASHINGTON, DC, ON APRIL 23, JUNE 11 AND 25, SEPTEMBER 26, AND NOVEMBER 7, 1985

Serial No. 99-68

Printed for the use of the Committee on Education and Labor

HEARINGS ON COMPENSATION FOR OCCUPATIONAL DISEASES

HEARINGS

BEFORE THE

SUBCOMMITTEE ON LABOR STANDARDS

OF THE

COMMITTEE ON EDUCATION AND LABOR
HOUSE OF REPRESENTATIVES

NINETY-NINTH CONGRESS

FIRST SESSION

ON

H.R. 1626

TO PROVIDE PROMPT, EXCLUSIVE, AND EQUITABLE COMPENSATION, AS A SUBSTITUTE FOR INADEQUATE TORT REMEDIES, FOR DISABILITIES OR DEATHS RESULTING FROM OCCUPATIONAL EXPOSURE TO ASBESTOS; AND FOR OTHER PURPOSES

AND

H.R. 3090

TO PROVIDE FOR THE COMPENSATION OF INDIVIDUALS WHO ARE DISABLED AS A RESULT OF OCCUPATIONAL EXPOSURE TO TOXIC SUBSTANCES AND PROCESSES TO REGULARIZE THE FAIR, ADEQUATE, AND EQUITABLE COMPENSATION OF CERTAIN OCCUPATIONAL DISEASE VICTIMS, AND FOR OTHER PURPOSES

HEARINGS HELD IN WASHINGTON, DC, ON APRIL 23, JUNE 11 AND 25, SEPTEMBER 26, AND NOVEMBER 7, 1985

Serial No. 99-68

Printed for the use of the Committee on Education and Labor

U.S. GOVERNMENT PRINTING OFFICE
56-059 O WASHINGTON : 1986

I

COMMITTEE ON EDUCATION AND LABOR

AUGUSTUS F. HAWKINS, California, *Chairman*

WILLIAM D. FORD, Michigan
JOSEPH M. GAYDOS, Pennsylvania
WILLIAM (BILL) CLAY, Missouri
MARIO BIAGGI, New York
AUSTIN J. MURPHY, Pennsylvania
DALE E. KILDEE, Michigan
PAT WILLIAMS, Montana
MATTHEW G. MARTINEZ, California
MAJOR R. OWENS, New York
RICK BOUCHER, Virginia
CHARLES A. HAYES, Illinois
CARL C. PERKINS, Kentucky
TERRY L. BRUCE, Illinois
STEPHEN J. SOLARZ, New York
MERVYN M. DYMALLY, California
DENNIS E. ECKART, Ohio
TIMOTHY J. PENNY, Minnesota
CHESTER G. ATKINS, Massachusetts

JAMES M. JEFFORDS, Vermont
WILLIAM F. GOODLING, Pennsylvania
E. THOMAS COLEMAN, Missouri
THOMAS E. PETRI, Wisconsin
MARGE ROUKEMA, New Jersey
STEVE GUNDERSON, Wisconsin
STEVE BARTLETT, Texas
ROD CHANDLER, Washington
THOMAS J. TAUKE, Iowa
JOHN R. McKERNAN, Jr., Maine
RICHARD K. ARMEY, Texas
HARRIS W. FAWELL, Illinois
PAUL B. HENRY, Michigan

SUBCOMMITTEE ON LABOR STANDARDS

AUSTIN J. MURPHY, Pennsylvania, *Chairman*

WILLIAM (BILL) CLAY, Missouri
PAT WILLIAMS, Montana
AUGUSTUS F. HAWKINS, California, (Ex Officio)

THOMAS E. PETRI, Wisconsin
STEVE BARTLETT, Texas
JAMES M. JEFFORDS, Vermont (Ex Officio)

CONTENTS

Page

Hearings held in Washington, DC, on:

- April 23, 1985 1
- June 11, 1985 217
- June 25, 1985 295
- September 26, 1985 365
- November 7, 1985 473

Text of H.R. 1626 2
Text of H.R. 3090 97

Statement of:

- Alter, Harvey, manager, Resource Policy Department, U.S. Chamber of Commerce, and Samuel A. Roth, associate manager, Employee Relations, U.S. Chamber of Commerce 252, 384
- Coakley, Charles, senior counsel, American Insurance Association 198
- Coakley, Charles, senior counsel, American Insurance Association, and Tom O'Day, assistant vice president, Alliance of American Insurers 434
- Connolly, Frank V., former director, Special Rating Division, War Production Board; and James Morgan, Industrial Hygienist 341
- Denison, Ray, director, Department of Legislation, AFL-CIO 480
- Fite, James, White Lung Association, Baltimore, MD, accompanied by Dan O'Toole, former business agent of the Ironworkers, Baltimore, MD, and current Maryland chapter president of the White Lung Association; and Robert Rankin, legislative representative of the Building and Trades Council for the AFL-CIO in Baltimore; and Paul Safchuck, White Lung Association, Baltimore, MD 237
- Hollingsworth, Joseph, attorney-at-law, Spriggs, Bode & Hollingsworth 217
- Parker, Earl G., senior vice president, law and public affairs, Manville Corp., accompanied by David E. Pullen, manager, U.S. Government affairs, Manville Corp 368
- Power, Jay, legislative-representative, AFL-CIO; and David Mallino, deputy legislative director, Industrial Union Department, AFL-CIO; and Don Elisberg, Esq., Connerton & Bernstein 155
- Ross, Frederick J., president and chief executive officer, Raymark Corp., Trumbull, CT 172
- Samuel, Howard, president, Industrial Unions Department, AFL-CIO 477
- Shea, Edward E., senior vice president, general counsel and secretary, GAF Corp 210
- Storey, James, coauthor, "Compensation for Victims of Asbestos-Related Diseases: Potential Cost Savings for the Federal Government" 231
- Willmore, Robert, Deputy Assistant Attorney General, Civil Division, U.S. Department of Justice 296

Prepared statements, letters, supplemental materials, etc.:

Alter, Harvey, and Samuel A. Roth, prepared statement on behalf of the Chamber of Commerce of the United States:

- June 11, 1985 258
- September 26, 1985 388

Associated General Contractors of America, prepared statement on:

- H.R. 1626 357
- H.R. 3090 493

Equity Security Holders of Manville Corp., prepared statement of 358
Georgine, Robert A., president, Building and Construction Trades Department, AFL-CIO, prepared statement of 161
Georgine, Robert, president, Building and Construction Trades Department, AFL-CIO, prepared statement of 474

Prepared statements, letters, supplemental materials, etc.—Continued | Page
- Hollingsworth, Joe G., Spriggs, Bode & Hollingsworth, Washington, DC, prepared statement of ... 221
- Leavitt, William S., vice president, corporate and legal affairs, UNR Industries, Inc., prepared statement of ... 228
- Morgan, James F., Havertown, PA, prepared statement of ... 347
- Murphy, Hon. Austin J., a Representative in Congress from the State of Pennsylvania and chairman, Subcommittee on Labor Standards, opening statement of ... 217
- National Education Association, prepared statement of ... 491
- O'Day, Tom prepared statement on behalf of the Alliance of American Insurers ... 436
- O'Toole, Daniel, prepared statement of ... 251
- Parker, G. Earl, senior vice president, Manville Corp., prepared statement of:
  - June 25, 1985 ... 359
  - September 26, 1985 ... 372
- Ross, Frederick J., president and chief executive officer, Raymark Corp., prepared statement, with attachment ... 178
- Safchuck, Paul, president, White Lung Association, balance of prepared statement ... 248
- Samuel, Howard D., president, the Industrial Union Department, AFL-CIO, prepared statement of ... 158
- Samuel, Howard, president, Industrial Union Department, AFL-CIO, prepared statement of ... 479
- Shea, Edward E., senior vice president, GAF Corp., prepared statement of ... 211
- Williams, Hon. Pat, a Representative in Congress from the State of Montana, opening statement of ... 367
- Willmore, Robert, deputy assistant attorney general, Civil Division, U.S. Department of Justice:
  - Letter from Chairman Murphy, enclosing several questions, dated August 8, 1985 ... 318
  - Letter to Chairman Murphy, enclosing responses to questions ... 319

HEARINGS ON COMPENSATION FOR OCCUPATIONAL DISEASES

TUESDAY, APRIL 23, 1985

House of Representatives,
Subcommittee on Labor Standards,
Committee on Education and Labor,
Washington, DC.

The subcommittee met, pursuant to call, at 1:30 p.m., in room 2261, Rayburn House Office Building, Hon. Austin J. Murphy (chairman of the subcommittee) presiding.

Members present from the Subcommittee on Labor Standards: Representatives Murphy, Petri, and Bartlett.

Staff present from the Subcommittee on Labor Standards: Thomas F. Lamb, staff director; Richard Fiesta, counsel; and Bruce Wood, Republican labor counsel.

[The text of H.R. 1626 and H.R. 3090 follows:]

99TH CONGRESS
1ST SESSION

H. R. 1626

To provide prompt, exclusive, and equitable compensation, as a substitute for inadequate tort remedies, for disabilities or deaths resulting from occupational exposure to asbestos; and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 20, 1985

Mr. MURPHY (for himself, Mr. HEFNER, Ms. KAPTUR, Mr. LATTA, Mr. LAGOMARSINO, Mr. BARNES, Mr. BROWN of Colorado, Mr. WEISS, Mr. STOKES, Mr. CHAPPIE, Mr. TOWNS, Mr. RAHALL, Mr. KRAMER, Mr. MITCHELL, Mr. BARNARD, Mr. SUNDQUIST, Mr. KANJORSKI, Mr. VANDER JAGT, Mr. HUCKABY, Mr. MOLLOHAN, Mr. SABO, Mr. CROCKETT, Mr. TAYLOR, Mr. SCHAEFER, Mr. KOLTER, Mr. DYMALLY, Mr. ADDABBO, Mr. MARTINEZ, Mr. LUKEN, Mr. COELHO, Mr. TRAXLER, Mr. ST GERMAIN, Mr. PACKARD, Mr. FAUNTROY, Mr. THOMAS of Georgia, Mr. WHITTAKER, Mr. UDALL, Mr. GAYDOS, Mr. O'BRIEN, Mr. LUNDINE, Mrs. HOLT, Mr. STRANG, Mr. NIELSON of Utah, Mr. KOSTMAYER, Mr. NEAL, Mr. DUNCAN, Mr. GARCIA, Mr. MATSUI, Mr. HAYES, and Mr. BEVILL) introduced the following bill; which was referred jointly to the Committees on Education and Labor and Ways and Means

---

A BILL

To provide prompt, exclusive, and equitable compensation, as a substitute for inadequate tort remedies, for disabilities or deaths resulting from occupational exposure to asbestos; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE AND TABLE OF CONTENTS.

This Act, together with the following table of contents, may be cited as the "Asbestos Workers' Recovery Act".

TABLE OF CONTENTS

Sec. 1. Short title and tables of contents.
Sec. 2. Findings and purpose.
Sec. 3. Definitions.

TITLE I—SUPPLEMENTAL BENEFITS

Sec. 101. Entitlement to supplemental benefits.
Sec. 102. Claims procedure.
Sec. 103. Reliance on worker's compensation programs.
Sec. 104. National Medical Panel.

TITLE II—FINANCE

Sec. 201. Assessments.
Sec. 202. Asbestos-Related Disease Trust Fund.
Sec. 203. Trust Fund administration.
Sec. 204. Trust Fund Committee.
Sec. 205. Grant and contracts for program improvement.

TITLE III—MISCELLANEOUS

Sec. 301. Third-party and tort actions.
Sec. 302. Separability; nullifying circumstances.
Sec. 303. Administrative authority and judicial review.
Sec. 304. Administrative costs and expenses.
Sec. 305. Certain language included for convenience.
Sec. 306. Effective date.

SECTION 2. FINDINGS AND PURPOSE.

(a) CONGRESSIONAL FINDINGS.—The Congress finds that—

(1) SIGNIFICANT PROBLEM.—A significant number of persons suffer disease, disability, or death caused by past occupational exposure to asbestos. Asbestos-related lawsuits involving more than 25,000 claimants have been filed. Litigation over the claims, growing at a rate of over 6,000 new cases a year, threatens to overwhelm the courts, to undermine the fi-

nancial stability of major sectors of United States industry, and to subject victims of asbestos-related occupational diseases to arbitrary, inefficient and tardy relief.

(2) EXISTING PROGRAM INADEQUACIES.—Existing programs for providing benefits to victims of asbestos-related occupational diseases function poorly, in the following respects:

(A) Some State workers' compensation programs do not adequately compensate occupational disease victims.

(B) Many asbestos disease victims or their surviving dependents rely on common-law remedies which, while giving large recoveries to few, leave many others with little or nothing. Using tort litigation to provide compensation for the many thousands of cases of asbestos-related diseases is inefficient, unpredictable, and inequitable. It imposes delay and unnecessary expense on all parties.

(C) Of every dollar spent on resolving asbestos claims, approximately 39 percent goes to the claimant; the rest is consumed by attorneys' fees and other transaction costs.

(D) If the existing litigation continues, the resources available to pay future disease claimants will be seriously impaired.

(E) The United States has refused to contribute to judgments or settlements in asbestos litigation, despite the fact that it may be held liable in pending litigation and certainly would already have been held liable if it were a private party.

(3) INDUSTRY-WIDE RESPONSIBILITY.—Industries that have extracted, produced, manufactured, constructed, or imported asbestos or asbestos-containing products have a responsibility to participate financially in providing adequate benefits for victims of asbestos-related diseases, for the following reasons:

(A) The industries were or are involved in the supplying or use of asbestos-containing products.

(B) The harmful exposure responsible for an asbestos-related occupational disease occurred years or decades before the disease became manifest, often in the course of employment with several employers, involving exposure to asbestos materials from several suppliers. Under such circumstances, allocating and enforcing financial responsibility among the parties case-by-case is unnecessarily slow, costly, unpredictable and burdensome for all parties concerned.

(C) Under existing workers' compensation laws, the employer provides benefits as the worker's exclusive remedy, without regard to fault and without expensive tort litigation. This principle should be extended so that companies which have supplied asbestos or asbestos-containing products will contributed to the compensation of workers disabled by such materials, so that this additional benefit, together with any available workers' compensation, will be the claimant's exclusive remedy.

(4) FEDERAL RESPONSIBILITY.—The United States Government directly shares in the responsibility for asbestos-related diseases in the following respects:

(A) The incidence of asbestos-related diseases is directly traceable to the World War II and Korean War efforts and subsequent Government military activities. An estimated 4.5 million workers were employed in Government and contract shipyards during World War II. The large majority of asbestos disease victims claim to have been exposed to asbestos while working in shipyards building or refitting naval vessels.

(B) During World War II, the Government found that asbestos was absolutely indispensable (because it had no acceptable substitutes) in assuring crew safety and combat readiness of warships and for other military construction. For this reason, the War Production Board assumed control of production and distribution of all asbestos supplies in the United States, and restricted uses of asbestos to military requirements. Under the War Powers Act, a manufacturer's failure to comply with the War Production Board's requirements was grounds for criminal prosecution.

(C) The Government sold asbestos fiber from Government stockpiles for use in the shipyards and other commercial purposes.

(D) Other asbestos materials were supplied to the Government in compliance with Government contract specifications mandating the use of asbestos materials. As late as 1979, U.S. Navy officials asserted that it is impossible to build a naval vessel without asbestos.

(E) The Government's responsibilities pursuant to chapter 81 of title 5, United States Code, the Federal Employees' Compensation Act, and the Walsh-Healey Act (41 U.S.C. 35–45), include the obligation to establish and supervise workplace standards for exposure to asbestos with respect to its own employees and contractors' employees.

(5) NATIONAL SOLUTION.—A national solution is essential for the following reasons:

(A) States acting alone cannot provide for a contribution to benefits by the industry or the United States, or address the inequities and inefficiencies in multistate tort litigation. Such litigation involves the Federal Government and principles of governmental liability or immunity under Federal law. However, existing State workers' compensation programs are, and should remain, the primary vehicle for providing benefits for such diseases.

(B) The unpredictable and often inequitable recoveries in tort litigation, and the resulting increased reliance on public assistance, impose a substantial burden on commerce and the public welfare.

(C) The causes of asbestos-related diseases are well enough understood, and are sufficiently discernible in individual cases, that a national no-fault compensation system can function effectively.

(D) The costs of the efficient product liability tort system, unique to the United States, could hamper the ability of domestic industry to compete in world markets, and threaten the financial viability of asbestos defendants and their insurers.

(E) The Federal Government therefore has the responsibility—

(i) to establish a mechanism for financial contribution by responsible industries as a substitute for inefficient, inadequate, and inequitable tort remedies and for supplementing workers' compensation benefits; and

(ii) to contribute financially, but only to an extent commensurate with the Federal Government's responsibility for an increased incidence of asbestos-related diseases.

(6) PROGRAM DESIGN.—Any program must be designed in such a way to assure that—

(A) benefits can be provided to the deserving claimant without regard to fault, and without the enormous legal transaction costs and arbitrariness that are inherent in tort-law remedies; and

(B) new Federal bureaucracy, Federal expenditures, and Federal impact on the administra-

BEST COPY AVAILABLE

tion of State programs are kept to the minimum necessary to carry out the purposes of this Act.

(b) PURPOSE OF ACT.—It is the purpose of this Act to establish a mechanism by which all involved parties will, to an extent commensurate with their involvement in the circumstance leading to compensable disability or death from the harmful occupational exposure to asbestos, share the cost of providing prompt, exclusive, and equitable compensation to persons suffering from diseases caused by occupational exposure to asbestos and their surviving dependents.

SEC. 3. DEFINITIONS.

For purposes of this Act—

(1) AFFECTED PERSON.—The term "affected person" means any individual who suffers or suffered from any disability or who dies or died from a disease caused by occupational exposure to asbestos. When used with reference to a particular claim for a supplemental benefit, the term refers to the affected person who is the subject of the claim.

(2) APPLICABLE WORKERS' COMPENSATION PROGRAM; LAW.—

(A) The term "applicable workers' compensation program," used in connection with a claim for a supplemental benefit, means—

(i) any workers' compensation program under which the affected person or any survivor has applied for and is eligible to receive workers' compensation;

(ii), if there is no such program, then any program that would assert jurisdiction over the employment out of which and in the course of which the occupational exposure to asbestos of the affected person arose; or

(iii), if there is still no such program, then any program that ordinarily exerts jurisdiction over employment in the place where the exposure occurred.

(B) If, under subparagraph (A), two or more programs are identified, the applicable program shall be selected from those so identified according to the following order of priority: the program that asserts or would assert jurisdiction on the basis of (i) the place where the exposure occurred, (ii) the place of making the contract, (iii) the place where the employment relation existed or was carried out, (iv) the place where the industry was localized, (v) the place where the employee resided or resides, (vi) the place whose statute the employee expressly adopted by contract, or (vii) Federal law.

(C) The term "applicable workers' compensation law" means the law of the applicable workers' compensation program.

(3) ASBESTOS.—The term "asbestos" means the commercial varieties of chrysotile, amosite, and crocidolite, and, when they appear in fibrous form, of tremolite, anthophyllite, and actinolite.

(4) ASBESTOS DEFENDANT.—The term "asbestos defendant" means any original asbestos defendant (as defined in subparagraph (A)), any added asbestos defendant (as defined in subparagraph (B)), and the United States. For purposes of this paragraph—

(A) The term "original asbestos defendant" means any supplier that is a defendant in any asbestos-related disease case, alleged to be liable in the case as a supplier of asbestos or asbestos-containing products; except that the term shall not include any individual or the United States. As used in the preceding sentence, the term "asbestos-related disease case" means any action filed in any State or Federal court between December 31, 1959, and January 1, 1983, in which there is a claim of liability for occupational exposure to asbestos; except that the term shall not include any action seeking only workers' compensation.

(B) The term "added asbestos defendant" means any person other than the United States who is or may be liable for occupational exposure to asbestos whom the Secretary of the Treasury includes as an asbestos defendant under a petition pursuant to section 201(c)(3).

(5) ASBESTOS OR ASBESTOS-CONTAINING PRODUCTS.—The term "asbestos or asbestos-containing products" means any objects, substances, or raw materials (including asbestos itself), but not including any real property or any ship or vessel, that (A) are capable of delivery either as a whole or as a component part, (B) are produced for introduction into trade or commerce, and (C) are at least in part composed of or contain asbestos.

(6) ASBESTOS-RELATED DISEASE.—The term "asbestos-related disease" means any disease that the National Medical Panel (established under section 104) decides can be caused by occupational exposure to asbestos.

(7) ASSESSMENT DUE DATE.—The term "assessment due date" means each June 30 and December 31 of 1985 and subsequent years.

(8) CHILD.—The term "child" has the meaning ascribed to the term "child" by sections 216(e) and 216(k) of the Social Security Act (42 U.S.C. §§416(e) and 416(k)). These sections of the Social Security Act shall be applied by analogy, as though the supplemental benefits under this Act were the "child's insurance benefits" referred to in section 216(e) of the Social Security Act, (42 U.S.C. 416(e)).

(9) CLAIMANT.—The term "claimant" means any individual who files a claim for a supplemental benefit under title I.

(10) DISABILITY, TOTAL DISABILITY, PARTIAL DISABILITY.—The term "disability" means a permanent loss of physical capacity that has resulted in a loss of (A) all of the affected person's earning capacity (referred to as "total disability") or (B) a part of the affected person's earning capacity (referred to as "partial disability").

(11) EMPLOYEE.—The term "employee" means any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an employee, including the officer of a corporation or other entity.

(12) IMMEDIATE FAMILY.—The term "immediate family" means the affected person and the spouse and

any child of the affected person (or any of their estates).

(13) **Liability for occupational exposure to asbestos.**—The term "liability for occupational exposure to asbestos" shall include liability of any person, under any circumstances or in any capacity, and under any theory or theories, for injury, illness, or death, loss, or detriment caused (directly or indirectly or in whole or in part) by occupational exposure to asbestos of any individual, including liability for any punitive or exemplary damages, and including liability to the person exposed or to any other person; except that the term shall not include liability under any workers' compensation law.

(14) **Managing trustee.**—The term "Managing Trustee" means the Secretary of the Treasury in his or her capacity under section 204(a)(1) as trustee of the Trust Fund.

(15) **Occupational exposure.**—The term "occupational exposure" means either (A) exposure of an employee arising out of and in the course of employment, or (B) exposure of a member of the employee's household that results from prior exposure of the employee arising out of and in the course of employment. For purposes of this definition, the term "member" of

an employee's "household" means any individual who dwelled with the employee.

(16) PERSON.—The term "person" means any individual, trust, estate, partnership, association, company, or corporation; or any other entity organized for a common purpose, including the United States of America or any State or political subdivision thereof.

(17) SPOUSE.—

(A) For purposes of a claim asserting disability, the term "spouse" means a person who is a "wife" or "husband," as those terms are defined under the requirements of sections 216(b)(1) and (2), 216(f)(1) and (2), and 216(h)(1) of the Social Security Act, (42 U.S.C. 416(b)(1)–(2), 416(f)(1)–(2), and 416(h)(1)). These sections of the Social Security Act shall be applied by analogy, as though the affected person, claimant, supplemental benefits, and claim for supplemental benefits under this Act were, respectively, the "fully or currently insured individual," "applicant," "benefit," and "application" referred to in section 216(h)(1) of the Social Security Act (42 U.S.C. 416(h)(1)).

(B) For purposes of a claim asserting death, the term "spouse" means a "widow" or "widower," as those terms are defined under the requirements of sections 216(c)(1) through (5), 216(g)(1) through (5), 216(k), and 216(h)(1) of the Social Security Act (42 U.S.C. 416(c)(1)—(5), 416(g)(1)—(5), 416(k), and 416(h)(1)) these sections of the Social Security Act shall be applied by analogy, as though the affected person, claimant, supplemental benefit, and claim for a supplemental benefit under this Act were, respectively, the "fully or currently insured individual," "applicant," "benefit," and "application" referred to in section 216(h)(1) of the Social Security Act (42 U.S.C. 416(h)(1)). If there is no such person, then a person who was divorced from the deceased affected person but had been married to such person for a period of 10 years immediately before the date the divorce became effective, and who, during the month preceding the month in which the affected person died, received or was entitled to receive support from the affected person equal to at least half of such spouse's total expenditures.

(18) SUPPLIER.—The term "supplier" means any person that is or was engaged in a business to do one or more of the following: extract, produce, manufac-

ture, construct, or import any asbestos or asbestos-containing products; including a seller, distributor, or retailer (A) that is also engaged in the extraction, production, manufacturing, construction, or importation of asbestos or asbestos-containing products, or (B) that holds itself out as a manufacturer of the products. These activities do not include cutting, shaping, molding, trimming, mixing, or similar activities by a construction contractor or subcontractor exclusively for installation by the construction contractor or any of its subcontractors in any real property or any ship or vessel.

(19) STATE.—The term "State" means any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, or the Northern Mariana Islands.

(20) TRUST FUND.—The term "Trust Fund" means the Asbestos-Related Disease Trust Fund established under section 202.

(21) WORKERS' COMPENSATION.—The term "workers' compensation" refers to any program or law administered by any State or the United States to provide benefits, ordinarily funded by the responsible employer or his insurance carrier, for occupational dis-

eases or injuries or for disability or death caused by occupational diseases or injuries.

TITLE I—SUPPLEMENTAL BENEFITS

SEC. 101. ENTITLEMENT TO SUPPLEMENTAL BENEFITS.

(a) COMPENSABLE DISABILITY OR DEATH.—A supplemental benefit shall be paid in respect of disability or death of an affected person, if the disability or death was caused by occupational exposure to asbestos.

(b) SUPPLEMENTAL BENEFIT.—

(1) AMOUNT OF AWARD.—The supplemental benefit award shall equal the maximum supplemental benefit computed under paragraphs (2) and (3), diminished in the case of partial disability in the same proportion as the disability is less than total.

(2) MAXIMUM SUPPLEMENTAL BENEFIT.—For purposes of the calculation in paragraph (1), the maximum supplemental benefit is equal to the product of—

(A) the State-wide average weekly wage (determined under section 102(d)) as of the date the first meritorious claim for benefits with respect to the affected person is filed under the Act, determined (i) for the State of the applicable workers' compensation program, if the applicable workers' compensation program is established under State law, or (ii) for the State in which the last injurious occupational exposure to asbestos occurred, if the applicable workers' compensation program is established under Federal law;

multiplied by—

(B) the supplemental benefit factor of 92.0.

(3) Adjustments in cases of multiple causation.—In any case in which disability or death resulted only in part from asbestos-related diseases or only in part from occupational exposure to asbestos, the maximum supplemental benefit shall be reduced to the extent appropriate under the applicable workers' compensation law.

(4) Redetermination of amount of award.—Once the Secretary has determined the amount of the award under paragraph (1) in a case of partial disability and has found that a supplemental benefit is payable under subsection (c) on the basis of that award, the Secretary may redetermine the amount of the award only when the affected person either (A) has experienced the loss of an additional 20 percent of earning capacity, or (B) has become totally disabled or died.

(c) Payment Method.—

(1) Interim payments.—

(A) **Monthly amount.**—If the Secretary of Health and Human Services has ordered under section 102(b)(1) that interim payment of a supplemental benefit is authorized in respect of an affected person, monthly interim payments shall be made in respect of that person. Each monthly payment shall be in an amount that, if paid in equal monthly installments over the five-year period commencing on the date of the first monthly payment, would yield the entire amount of the supplemental benefit award under subsection (b)(1), minus any portion of the award that may have already been paid.

(B) **Duration.**—Monthly interim payments shall commence when the Secretary of Health and Human Services has issued the ruling referred to in paragraph (A) and shall cease on the earliest to occur of the following dates:

(i) the date the Secretary of Health and Human Services withdraws the ruling; or

(ii) the date the entire amount of the supplemental benefit award under subsection (b)(1) has been paid; or

(iii) the date there are no eligible recipients qualified to receive interim payments under subsection (d).

(2) FINAL PAYMENTS.—

(A) AMOUNT.—If the Secretary of Health and Human Services has ordered under section 102(b)(2) that final payment of a supplemental benefit is authorized in respect of an affected person, payment shall be made of the entire amount of the supplemental benefit award under subsection (b)(1), minus any portion of the award that may have already been paid.

(B) FORM OF PAYMENTS.—Final payment shall be made in the form of a lump-sum payment, in the form of an annuity, or a portion in each form, as the payment recipient may elect. The Secretary of Health and Human Services shall abide by such an election unless the Secretary determines that the best interests of the payment recipient or any other member of the immediate family would clearly be served by not doing so. If a portion of the supplemental benefit is to be paid as an annuity, the Secretary shall contract with financial institutions licensed by any State or the United States to pay such an annuity. Each such annuity shall have a total present value equal to that portion of the supplemental benefit payable under subsection (b)(1), and the annuity shall provide for payment on such terms as the Secretary may determine are in the best interest of the payment recipient and any other member of the immediate family. The annuity shall be fully paid for in advance, and such payment shall entirely discharge the obligation of the Trust Fund with respect to the affected person.

(d) PAYMENT RECIPIENTS.—

(1) DETERMINATION DATES.—The persons who are eligible under paragraph (2) to receive a supplemental benefit payment under subsection (c)—

(A) shall be initially determined, in the case of disability, as of the date the first meritorious claim asserting disability was filed, and

(B) shall be determined or redetermined, in the case of death, as of the date of death.

(2) PRIORITIES.—Payments shall be made (A) to the affected person, while the affected person lives; (B) to the affected person's spouse, if any, after the affected person's death and before the death or remarriage of the spouse; and (C), thereafter, to the affected person's children, if any, under the age of 18. When pay-

ments are made to the affected person's children, each child under the age of 18 shall be paid a separate pro-rata share of the payment. When there are no eligible recipients qualified to receive payment under this subsection, no interim payments of a supplemental benefit shall be made, but any final payment of such a benefit shall be made to the heirs of the estate of the deceased affected person, except that in no event shall the payment escheat to the State or be paid to creditors of the deceased.

(e) LIMITATION: NO DOUBLE PAYMENT.—Notwithstanding the method or form by which benefits are paid, the number of asbestos-related diseases or episodes of occupational exposure to asbestos that are suffered, the number of separate occasions on which benefits may become payable, or any other circumstances, the total amount of the supplemental benefit in respect of any individual affected person that may be payable at any time or that may be paid in aggregate shall not exceed the amount stated under subsection (b)(1).

(f) PROTECTION AGAINST BENEFIT REDUCTION.—

(1) NO TAX, ETC.—

(A) Notwithstanding any other law of the United States or of any State, no supplemental benefit shall be subject to any tax or to any attachment, execution, levy, tax lien, garnishment, detention, or other legal process whatever.

(B) Section 130 of the Internal Revenue Code of 1954 (relating to cross references to income exclusions under other acts), is amended by adding after paragraph (8) the following new paragraph:

"(9) Supplemental benefits under section 101 of the Asbestos Workers' Recovery Act, see section 101(f) of that Act."

(2) NO OFFSET FOR ADMINISTRATIVE BENEFITS.—Supplemental benefits shall not offset or be offset by any payment under any workers' compensation, unemployment compensation, disability insurance, or other benefits law under any existing or subsequent State or Federal law, or deprive the claimant of any right, privilege, or benefit under any such law.

(3) OFFSET FOR CERTAIN PRIOR RECOVERIES.—Except as expressly prohibited by paragraph (2), the amount of the supplemental benefit payable under subsection (b) shall be reduced by the amount of any recovery by the affected person or any other member of the immediate family, as settlement or judgment in any claim or civil action, as payment pursuant to a reorganization or liquidation under title 11, United States

Code or otherwise, in respect of any liability for occupational exposure of the affected person to asbestos.

(g) PAYMENT ONLY FROM TRUST FUND.—Supplemental benefits shall be paid only out of the general account of the Trust Fund and shall not constitute a general obligation of the United States. Should the total claims outstanding at any time exceed the current balance of the general account in the Trust Fund, the Managing Trustee shall pay such claims, to the extent authorized under this title, in full in the order in which they were finally determined.

(h) LIMITATION ON REMEDY NECESSARY FOR BENEFITS.—No person shall be eligible to receive a supplemental benefit if for any reason the limitation on remedy under section 301(a) does not apply to forbid the affected person or any other member of the immediate family from commencing or maintaining an action of the type referred to in section 301(b) (relating to actions ordinarily covered by the restriction on remedy). The situations covered by the preceding sentence shall include (without limitation) any situation where section 301(a) on its face or as applied to the person has been adjudged invalid.

SEC. 102. CLAIMS PROCEDURE.

(a) FILING OF CLAIMS.—

(1) REGULATIONS.—A supplemental benefit shall be paid pursuant to a claim filed in such manner and in

such form and containing such information as the Secretary of Health and Human Services shall by regulation prescribe. Such regulations shall be promulgated within 120 days after enactment of this Act.

(2) NOTICE OF RECOVERY.—In addition to other information required by the Secretary under regulations promulgated in paragraph (1), the claim shall indicate whether the affected person or any member of the immediate family has received any recovery as settlement or judgment in any claim or civil action, as payment pursuant to a reorganization or liquidation under title 11, United States Code or otherwise, in respect of any liability for occupational exposure of the affected person to asbestos.

(3) WHO MAY FILE CLAIMS.—A claim asserting disability may be filed only by the affected person. A claim asserting death may be filed only by the affected person's spouse or, if there is no spouse, by any child of the affected person, if such spouse or child is eligible under section 101(d).

(4) TIME FOR FILING CLAIM.—A claim for a supplemental benefit may be filed only within the terms of the following subparagraphs:

(A) As to any claim asserting death or disability that occurred on or after the effective date of this Act, only within two years after the claimant became eligible to file such claim.

(B) As to any claim asserting death or disability that, on such effective date, is the subject of a timely-filed pending legal action that is terminated under the provisions of section 301(a)(4), only within two years after such effective date.

(C) As to any claim that (i) asserts death or disability that occurred before the effective date of this Act, (ii) is not the subject of a pending legal action, and (iii) on the effective date is still within the time period during which the person asserting such claim could have filed a legal action based on facts giving rise to such claim but for the provisions of section 301(a) or, if later, within two years after the initial disability, only within two years after such effective date.

(b) AUTHORIZATION OF SUPPLEMENTAL BENEFIT.—The Secretary of Health and Human Services, acting in reliance on certifications provided by the applicable workers' compensation program as to whether the claim is meritorious (as provided in section 103), shall—

(1) order that interim payment of a supplemental benefit under section 101(c)(1) is authorized with respect to an affected person if—

(A) a determination has been made that the claim is meritorious, still subject to possible administrative or judicial reconsideration, review, or appeal under subsection (c)(1) or section 103(b)(3), and

(B) the payment of supplemental benefits on an interim basis, while relevant determinations are undergoing administrative or judicial reconsideration, review, or appeal, is appropriate under the applicable workers' compensation law; or

(2) order that final payment of a supplemental benefit under section 101(c)(2) is authorized with respect to an affected person, if a determination has been made that the claim is meritorious and the determination is not still subject to possible administrative or judicial reconsideration, review, or appeal.

(c) General Procedures.—

(1) Reliance on social security review mechanisms.—

(A) Reliance generally.—In carrying out the provisions of this title, the Secretary of Health and Human Services shall, to the maximum extent feasible (consistent with the terms and policies of this Act), use the personnel and procedures that he or she uses in determining entitlement to disability insurance benefit payments under section 223 of the Social Security Act (42 U.S.C. 423).

(B) Specific provisions applicable.—In reviewing claims for supplemental benefits, the Secretary and the Federal courts shall apply the provisions of sections 204 (relating to overpayments and underpayments), 205 (a), (b), and (d) through (n) (relating to administrative and judicial procedures and certification for payment), 206 (relating to representation of claimants), 207 (relating to assignment of the right to receive supplemental benefits), and 208 (relating to penalties) of the Social Security Act (42 U.S.C. 404, 405 (a), (b), and (d) through (n), 406, 407, and 408). These actions of the Social Security Act shall be applied by analogy, as though the "Managing Trustee" defined in those sections were the "Managing Trustee" referred to in this Act. Any interim benefits paid under section 101(c), with respect to a claim for supplemental benefits which is subsequently disallowed, shall be deemed to be an overpayment for purposes of this subsection.

(2) Delegation to state agencies.—

(A) GENERALLY.—Determinations of whether a claimant is eligible to receive a supplemental benefit shall be made either by the Secretary or, after delegation by the Secretary, by a State agency. Any reference in this title to a determination made by the Secretary with respect to a claim shall include, and shall apply to, a determination made by a State agency exercising authority delegated under this subsection (2).

(B) SPECIFIC PROVISIONS APPLICABLE.—The provisions of sections 221(a)–(g) of the Social Security Act (42 U.S.C. 421(a)–(g)) (relating to the delegation to State agencies of the authority to make certain determinations), shall apply, except that the last sentence of section 221(e) of the Social Security Act (42 U.S.C. §421(e)), (relating to adjustments between certain funds) shall not apply. These sections of the Social Security Act shall be applied by analogy, as though the "disability determinations" referred to in those sections were the determinations of whether a claimant is eligible to receive a supplemental benefit under this title, and as though the "Trust Fund" referred to under those sections were the "Trust Fund" established under this Act. Section

221(e) of the Social Security Act (42 U.S.C. §421(e)), shall be applied to authorize payments from the Trust Fund of additional costs to the State of making the determinations delegated under this subsection, but not including the costs of making determinations that the State, under authority independent of the delegation, would have made before or simultaneously with the delegated determination.

(C) DELAY.—If a State agency exercising delegated authority under this subsection fails to make any determination in a timely manner, the Secretary, upon petition by either the claimant or the Managing Trustee, shall review the handling of the claim and shall remove it from further consideration by the State agency if such removal would expedite ultimate disposition of the claim.

(D) AUTHORITY TO PRECEDE WORKERS' COMPENSATION DECISION.—Notwithstanding the requirements of section 103(b)(1) (relating to mandatory reliance on workers' compensation determinations), any applicable workers' compensation program may, under authority delegated by the Secretary under subsection (c)(2), make determinations for purposes of the claim for a supplemental benefit, including determinations with respect to any issue listed in section 103(b)(1) (A) through (C), even if the same program, acting under authority independent of this Act, will not make determinations on the same issues until some other time.

(d) State-Wide Average Weekly Wage.—On or before December 31 of each year, the Secretary of Labor, in consultation with the Secretary of Health and Human Services, shall determine the average weekly wage for manufacturing workers in each State during the 12-month period ending October 31 of that year. Such determinations shall govern decisions of the Secretary of Health and Human Services under this title for all claims filed in the following calendar year. The Secretary of Labor shall make such determination under the informal rulemaking procedures of 5 Section 553 of title 5, United States Code, the Administrative Procedure Act.

(e) Prior Court Determinations.—In addition to and subject to the requirements of subsection 103(b) (relating to reliance on determinations of the applicable workers' compensation program and reliance on the applicable workers' compensation law), the Secretary of Health and Human Services in determining eligibility for a supplemental benefit shall rely upon any relevant final determination of a State or

Federal court binding on the claimant with respect to an issue of fact.

SEC. 103. RELIANCE ON WORKERS' COMPENSATION PROGRAMS.

(a) WORKERS' COMPENSATION CLAIM NECESSARY.—

(1) GENERAL RULE.—Before a claim may be filed for a supplemental benefit, an application must first have been filed for workers' compensation on account of the disability or death of the affected person under the applicable workers' compensation program, except as provided in paragraph (2).

(2) EXCEPTIONS.—A prior application need not have been filed for workers' compensation, if it would clearly be denied with none of the issues referred to in subsection (b)(1)(A), (B), or (C) having been determined, or if the workers' compensation claim has been settled or compromised.

(b) RELIANCE ON WORKERS' COMPENSATION DETERMINATIONS.—

(1) MANDATORY RELIANCE.—Except as provided in paragraphs (2), (3), and (4), the Secretary of Health and Human Services shall not consider a claim for a supplemental benefit until after the applicable workers' compensation program has made a determination with respect to each of the issues listed in subparagraphs

(A) through (C), and has not found the affected person or survivor to be ineligible, based on those issues, to receive workers' compensation. The Secretary shall rely exclusively on the determinations made by the applicable workers' compensation program with respect to such listed issues, which are as follows:

(A) whether the affected person is disabled, and, if so, the nature and extent of the disability, or whether the affected person has died;

(B) whether, and to what extent, the affected person's disability or death was caused by an asbestos-related disease; and

(C) whether, and to what extent, the asbestos-related disease arose out of the affected person's exposure to asbestos in the course of employment.

(2) EXCEPTION: RELIANCE NOT POSSIBLE.—The Secretary of Health and Human Services shall consider a claim for a supplemental benefit even though the applicable workers' compensation program has not made any determination referred to in paragraphs (1)(A) through (C), if any of the following conditions applies:

(A) INCOME NOT DECIDED.—The applicable workers' compensation program approved or denied the application for workers' compensation without reaching any issue referred to in paragraphs (1)(A) through (C).

(B) SETTLEMENT OR COMPROMISE.—The applicant has obtained workers' compensation by settlement or compromise of the workers' compensation claim.

(C) NO APPLICATION FILED.—As permitted under subsection (a)(2), no application for workers' compensation was filed.

(3) EXCEPTION: DELAY.—

(A) AUTHORITY TO CONSIDER.—The Secretary may, under the procedures of subparagraph (B), decide to consider a claim for a supplemental benefit even though the applicable workers' compensation program has not made any determination referred to in paragraphs (1)(A) through (C), if any of the following conditions applies:

(i) the claimant has filed an application for workers' compensation under the applicable workers' compensation program, and over 45 days have elapsed without the program having determined what, if any, additional information necessary for a decision must still be supplied by the applicant;

(ii) the applicant has supplied all information necessary for a decision, and over 180 days have elapsed without the program having rendered a determination; or

(iii) a reviewable determination has been made, and over 180 days have elapsed without the determination having been either overturned or upheld, or without the time for applying for review having expired.

(B) PROCEDURE FOR CONSIDERATION.—The Secretary shall make his or her own determination referred to in subparagraph (A), upon petition by the claimant or the Managing Trustee, but only if the Secretary believes that to do so will further the prompt and fair disposition of the claim. Any determination by the Secretary under this paragraph (3) shall be withdrawn when the applicable workers' compensation program has made the determination whose delay was the condition authorizing the Secretary's determination.

(4) EXCEPTION: DISEASE NOT ASBESTOS-RELATED.—In reviewing a claim for supplemental benefits, the Secretary shall rely on a determination by the applicable workers' compensation agency that a disease resulted from occupational exposure of the affected

person to asbestos, only if the National Medical Panel has determined under section 104 that the disease can be caused by asbestos.

(5) ADDITIONAL RELIANCE WHERE FEASIBLE.—On issues other than those referred to in paragraph (1)(A) through (C), the Secretary in the review of a claim for a supplemental benefit shall rely on determinations of the applicable workers' compensation program to the maximum extent feasible (consistent with the terms and policies of this Act).

(c) APPLICABLE LAW.—With respect to any of the issues referred to in section (b)(1)(A) through (C) and any other matters, to the extent not inconsistent with the terms, definitions, and policies of this Act, the Secretary in reviewing a claim for a supplemental benefit shall apply, by analogy, the applicable workers' compensation law.

SEC. 104. NATIONAL MEDICAL PANEL.

(a) ESTABLISHMENT OF NATIONAL MEDICAL PANEL.—

(1) CREATION; SIZE.—There is hereby created within the Department of Health and Human Services the National Medical Panel on Asbestos-Related Diseases (referred to in this Act as the "National Medical Panel"), to consist of a chairman and four members ap-

pointed as provided in subsection (3), and to act by the concurrence of the chairman and two members.

(2) PURPOSES.—The National Medical Panel shall—

(A) decide which diseases shall be included on, and which shall be omitted from, the list of asbestos-related diseases under subsection (b);

(B) review claims referred to the Panel by the Secretary of Health and Human Services under subsection (c), to determine whether a disease of the affected person can be caused by asbestos; and

(C) publish Guidance Documents under subsection (d).

(3) APPOINTMENTS.—The Secretary of Health and Human Services, in coordination with the President of the National Academy of Sciences (referred to in this section as the "NAS"), shall arrange for medical scientists to be proposed, nominated, and appointed for service on the National Medical Panel in the following manner:

(A) GENERAL.—Within 45 days after enactment of this Act, the Secretary shall (i) appoint the chairman and two members of the Panel from among the medical scientists proposed by medical organizations and nominated under subsection (B) by the NAS; and (ii) appoint two members of the Panel from among the medical scientists proposed under subparagraph (C) by the International Association of Industrial Accident Boards and Commissions (referred to in this section as the "IAIABC") and nominated under subparagraph (C) by the NAS.

(B) MEDICAL SCIENTISTS PROPOSED BY MEDICAL ORGANIZATIONS.—The NAS will request the American College of Pathologists, the National Cancer Institute, and the American Thoracic Society each to propose individuals who are leaders in the fields of medical sciences related to the health effects of occupational exposure to asbestos, and who are otherwise well qualified to serve on the Panel. From among the individuals proposed by these medical organizations, the NAS will nominate six when the Panel is being initially established, and three whenever a successor must be appointed to the Panel from among the individuals proposed by the medical organizations. The successor to the chairman or any member of the Panel appointed under subparagraph (A)(i) from among the individuals proposed by the medical organizations shall likewise be appointed from among the individuals to be proposed by the medical organizations.

(C) MEDICAL SCIENTISTS PROPOSED BY WORKERS' COMPENSATION ASSOCIATION.—The NAS will request the IAIABC to propose individuals who are leaders in the fields of medical sciences related to the health effects of occupational exposure to asbestos, who are experienced in the application of those fields of science to the adjudication of workers' compensation issues, and who are otherwise well qualified to serve on the Panel. From among the individuals proposed by the IAIABC, the NAS will nominate six when the Panel is being initially established, and three whenever a successor must be appointed to the Panel from among the individuals proposed by the IAIABC. The successor to any member of the Panel appointed under subparagraph (A)(ii) from among the individuals proposed by the IAIABC shall likewise be appointed from among the individuals to be proposed by the IAIABC.

(D) REPLACEMENT ORGANIZATIONS.—If any of the organizations responsible for proposing or nominating individuals for membership on the

Panel should cease to exist, or be unwilling to, or become inappropriate for, carrying out its responsibilities under this subsection, the Secretary shall, after consulting with the remaining organizations, designate a replacement.

(4) TERMS.—

(A) INITIAL TERMS.—(i) The first chairman of the National Medical Panel shall be appointed for a term ending seven years after the date of enactment of this Act; (ii) the first members appointed from among the individuals to be proposed by medical organizations under subsection (3)(B) shall be appointed for terms ending three and five years, respectively, after the date of enactment of this Act; and (iii) the first members appointed from among the individuals to be proposed by the IAIABC under paragraph (3)(C) shall be appointed for terms ending four and six years, respectively, after the date of enactment of this Act. The term of each shall be designated by the Secretary at the time of appointment.

(B) SUCCESSORS' TERMS.—Except as provided in this subparagraph, each successor shall be appointed for a term of seven years from the date of expiration of the term for which the predecessor was appointed. The chairman or a member may continue to serve after the expiration of his or her term until the successor has taken office, except that he or she may not continue to serve more than one year after the date on which the term would otherwise expire. The chairman or any member of the Panel appointed to fill a vacancy occurring prior to the expiration of the term for which the predecessor was appointed shall be appointed for only the remainder of the term.

(C) REMOVAL.—The chairman or any member of the Panel may be removed by the Secretary for neglect of duty or malfeasance in office but for no other cause.

(5) COMPENSATION.—Any chairman or member of the National Medical Panel who is not a regular full-time employee of the United States shall be appointed without regard to the provisions of title 5, United States Code, governing appointments to the public service, and shall receive no salary but shall, while attending meetings of the Panel or otherwise engaged on business of the Panel, receive compensation and allowances as provided in the Public Health Service Act (42 U.S.C. 210(c)) for members of national advisory councils.

(b) LISTED ASBESTOS-RELATED DISEASES.—

(1) PROMULGATION OF THE ORIGINAL LIST.—Within 120 days after enactment of this Act, based on a survey of all available scientific and medical evidence, the National Medical Panel shall determine what diseases can be caused by occupational exposure to asbestos, and the Panel shall promulgate a list of such asbestos-related diseases.

(2) DETERMINATIONS TO OMIT FROM THE LIST.—In response to a claim referred to it under subsection (c) or otherwise from time to time in its discretion, if the Panel finds that the available scientific evidence does not warrant a determination that a disease can be caused by occupational exposure to asbestos, the Panel shall promulgate its decision that the disease be omitted from the list of asbestos-related diseases.

(3) EXPLANATORY STATEMENT.—Any decision that a disease be included on or be omitted from the list of asbestos-related diseases shall be accompanied by an explanatory statement of the determination, including a description of the evidence upon which the decision was based and the interpretation and weight given to the evidence by the Panel.

(4) AMENDMENTS; PROCEDURES.—The Panel may from time to time, as the need arises, amend the

list of asbestos-related diseases or otherwise issue or revise any decision or explanatory statement under this subsection (b). The Panel may initiate a proceeding under this subsection (b) upon petition of any person or upon the Panel's own initiative, or in response to a claim referred to the Panel under subsection (c). Actions under this subsection (b) shall be governed by section 553 of title 5, United States Code (relating to informal rulemaking).

(c) REFERRAL OF CLAIMS TO THE PANEL.—

(1) CONDITIONS FOR REFERRAL.—

(A) IN GENERAL.—The Secretary shall refer a claim to the National Medical Panel only if the claimant asserts that the affected person's disability or death was caused by a disease that is not on the list of asbestos-related diseases, and if—

(i) the Panel has not decided under subsection (b)(2) that the disease be omitted from the list, and if the claimant presents evidence that the disease can be caused by asbestos; or

(ii) the Panel has decided under subsection (b)(2) that the disease be omitted from the list, but if the claimant presents evidence that was not considered by the Panel in reaching the decision and that may demonstrate that the decision was incorrect.

(B) OTHER CASES NOT REFERRED.—In all other cases not referred to in subparagraph (A)(i) or (A)(ii), if a claimant asserts that the affected person's disability or death was caused by a disease that is not listed under subsection (b) as being an asbestos-related disease, the Secretary shall not refer the claim to the Panel, but shall determine that the disease of the affected person was not caused by occupational exposure of the affected person to asbestos.

(2) DECISION WITH RESPECT TO CLAIMS.—Within 120 days after referral of a claim under paragraph (1)(A), the National Medical Panel shall, under subsection (b), determine either (A) that the disease of the affected person can be caused by occupational exposure to asbestos and should therefore be added to the list of asbestos-related diseases; or (B) that the available scientific evidence does not warrant a determination that the disease can be caused by occupational exposure to asbestos and the disease should therefore be omitted from the list of asbestos-related diseases.

(d) GUIDANCE DOCUMENTS.—

(1) GENERAL.—The National Medical Panel shall publish Medical Assessment Guidance Documents (referred to in this Act as "Guidance Documents") for all asbestos-related diseases, to provide background information and recommendations to assist the parties and decisionmakers with respect to whether or not a disease was caused by occupational exposure to asbestos. Subject to section 103 (relating to reliance on decisions of applicable workers' compensation programs), Federal agencies shall apply the applicable recommendations in Guidance Documents in any Federal determinations relating to granting or denying any application for supplemental benefits or for Federal workers' compensation benefits.

(2) CONTENTS.—Each Guidance Document shall contain information and recommendations to assist in determining whether an individual has been disabled or has died from occupational exposure to asbestos, including specific medical diagnostic criteria.

(3) TIMING.—Guidance Documents shall be published, for any disease included on the list of asbestos-related diseases under subsections (b) (1) and (4), within 60 days after the decision that the disease be included on the list. Guidance Documents may be amended from time to time as the need arises.

(e) ADMINISTRATION.—

(1) REGULATIONS.—The Secretary shall promulgate regulations that shall govern the operations of the National Medical Panel. Such regulations shall require compliance with the provisions of the Federal Advisory Committee Act (5 U.S.C. App.) only to the extent that such compliance is necessary to the effective functioning of the Panel. Such regulations shall allow participation by the Trust Fund Committee (established under section 204) or by those who pay assessments to the Trust Fund.

(2) PERSONNEL.—The Secretary shall furnish to the National Medical Panel an executive secretary and such other personnel and other services (including services of consultants obtained by contract) as are necessary to the conduct of its duties.

(f) AUTHORITY TO COLLECT DATA.—Notwithstanding any statutory restrictions on the authority of agencies and departments of the Federal Government to share information, such agencies and departments shall provide the National Medical Panel with such information and data as the Panel, through the Secretary of Health and Human Services, may request to carry out its duties. The Panel may request such information, from any sources, as it may require to carry out its duties.

TITLE II—FINANCE

SEC. 201. ASSESSMENTS.

(a) IMPOSITION OF ASSESSMENT ON ASBESTOS DEFENDANTS.—An assessment is hereby imposed upon each asbestos defendant, to be due and payable on each June 30 and December 31 of 1985 and each year thereafter. (These dates are referred to in this section as "assessment due dates.") The amount of each asbestos defendant's assessment shall be the amount calculated as follows:

(1) GROSS AMOUNT.—The gross amount of the assessment shall be the product of (A) the aggregate semi-annual assessment determined under subsection (b) for the assessment due date, (B) multiplied by the individual asbestos defendant's assessment allocation factor determined under subsection (c), but reduced by the credit for prior recoveries under paragraph (2).

(2) MINUS PAYMENTS MADE FOR PRIOR RECOVERIES.—The amount calculated under paragraph (1) shall be reduced by any amount already paid by the asbestos defendant, pursuant to a settlement or a judgment in any claim or civil action, pursuant to a court approved plan of reorganization or liquidation under title 11, United States Code or otherwise, in respect of any liability for occupational exposure to asbestos, paid to any affected person with respect to whom a supple-

mental benefit had been awarded under section 101, or to any member of the immediate family, except that the amount of credit for any such payment shall not exceed the amount by which the supplemental benefit was reduced, under section 101(f)(3), on account of the payment. The amount to be deducted under this paragraph (2) may be carried forward and credited against the assessment levied on any subsequent assessment due date.

(3) MINUS ASSESSMENT ON INSURERS.—The assessment actually imposed upon an asbestos defendant shall be the gross amount calculated under paragraphs (1) and (2), minus the amounts of assessments under subsection (d) imposed on the same assessment due date on any asbestos insurance policies under which the asbestos defendant is the insured.

(b) AGGREGATE SEMI-ANNUAL ASSESSMENT.—For purposes of subsection (a), the aggregate semi-annual assessment for any assessment due date shall be determined as follows:

(1) FOR 1985 AND 1986.—On June 30 and December 31 of 1985 and 1986, the aggregate semi-annual assessment shall be $150 million.

(2) FOR 1987 AND THEREAFTER.—On each assessment due date after December 31, 1986, the aggregate semi-annual assessment shall be—

(A) the amount expended or transferred from the general account of the Trust Fund during the six-month period beginning one year before the assessment due date,

(B) increased by any amount advanced under section 202(b)(2)(B) (plus interest accrued under section 203(b)) and not yet repaid as of six months preceding the assessment due date,

(C) increased by any amount of assessments that were previously imposed but that the Secretary, during the six-month period beginning one year before the assessment due date, determined were uncollectible because of insolvency or bankruptcy or for any other reason,

(D) reduced by any amount recovered and credited to the Trust Fund under section 203(c) (relating to recovery by the Trust Fund) during the six-month period beginning one year before the assessment due date, and

(E) reduced, on each assessment due date after December 31, 1986, by the amount by which the balance in the general account of the

Trust Fund six months preceding the assessment due date exceeds the largest amount expended or transferred from the general account of the Trust Fund during any twelve month period during the three years preceding the assessment due date.

(c) ASSESSMENT ALLOCATION FACTORS.—For purposes of subsection (a)(1), each asbestos defendant shall have an assessment allocation factor, to be determined as follows:

(1) AGREEMENT AMONG ORIGINAL ASBESTOS DEFENDANTS.—The original asbestos defendants shall enter into an agreement governing the allocation among themselves of their responsibility to pay assessments under this Act (referred to in this subsection as the "assessment allocation agreement"), and shall submit the agreement in writing to the Secretary of the Treasury.

(2) ASSIGNMENT OF FACTORS.—

(A) PARTIES TO AGREEMENTS.—The Secretary shall assign to the parties to the assessment allocation agreement, collectively, an assessment allocation factor of 0.5, which amount shall be subdivided among the parties to the agreement pursuant to the terms of the agreement; and the portion so assigned to any party shall be that party's assessment allocation factor.

(B) UNITED STATES.—The Secretary shall assign to the United States an assessment allocation factor of 0.5.

(3) PETITIONS FOR INCLUSIONS.—Any person that is not an original asbestos defendant of the United States, but that is or may be liable for occupational exposure to asbestos, may petition the Secretary of the Treasury to be made an added asbestos defendant for all purposes under this Act, and to be tentatively assigned an assessment allocation factor. Following notice of such tentative assignment, the petitioner shall have 20 days within which to withdraw the petition, after which time the assignment shall become effective and irrevocable, and the assessment allocation factors assigned under paragraph (2)(A) or previously assigned under this paragraph (3) shall be proportionately reduced. The Secretary shall charge each petitioner a user fee sufficient to cover the Secretary's expenses in reviewing and reaching a determination on the petition. As of the effective date of the approval of the petition, there shall be due and payable from the petitioner an interim assessment in an amount equal to the product of the assessment that would have been imposed on the petitioner if it had been an asbestos defendant on the preceding assessment due date, multiplied by the un-

elapsed portion of the six-month period extending from the preceding to the succeeding assessment due date.

(4) PROMULGATION AND REVISION OF ASSESSMENT ALLOCATION FACTORS.—The Secretary of the Treasury shall promulgate the assessment allocation factors no later than June 30, 1985, and if any assessment allocation agreement calls for assignment of different factors for different assessment due dates, the Secretary shall so indicate.

(d) IMPOSITION OF ASSESSMENT ON INSURANCE.—

(1) GENERAL.—An assessment is hereby imposed on the insurer under each asbestos insurance policy (as defined in subsection (6)), to be due and payable on each assessment due date. The amount of each policy's assessment shall be a proportionate share of the assessment imposed originally on the asbestos defendant referred to in subsection (6)(B) (referred to in this subsection (a) as the "insured"), to be calculated as the product of—

(A) the gross amount of the assessment imposed under subsections (a)(i) and (2) upon the insured,

(B) multiplied by the proportion of the insured's total insurance coverage that is provided by this policy, calculated under paragraph (2).

(2) PROPORTION OF TOTAL COVERAGE.—The proportion of the insured's total coverage under paragraph (1)(B) is to be calculated by dividing the adjusted value (as defined below) of the policy by the sum of the adjusted values of all asbestos insurance policies providing insurance to the insured. If the adjusted value of the policy is zero, then the proportion shall also be zero. The "adjusted value" of an asbestos insurance policy means the outstanding value (as calculated under paragraph (3)), adjusted for certain kinds of policies under paragraph (4).

(3) OUTSTANDING VALUE.—

(A) CLAIM NOT TO EXCEED.—The insurer under any asbestos insurance policy shall in no event be obligated to pay any claim under the policy or any assessment under this section 201 that exceeds the outstanding value of the policy calculated as provided under subparagraphs (B) and (C).

(B) COMPUTATION OF OUTSTANDING VALUE.—As of any assessment due date, the outstanding value of an asbestos insurance policy shall equal the face value of the policy, if any, plus any allowance for defense costs (as provided in subparagraph (C)), minus any amounts paid out under the policy before such date and minus the aggregate amounts of assessments imposed under this subsection on the policy before such date. If the policy has no face value, the Secretary shall estimate the amount that would, in the absence of this Act, be paid out under the policy for liability for occupational exposure to asbestos; the outstanding value of the policy as of any assessment due date shall be that estimated amount, minus the amount paid out under the policy for such liability other than under this Act, and minus the aggregate amount of assessments imposed under this subsection on the policy before such date.

(C) Defense allowance.—For any asbestos insurance policy that obligates an insurer to defend its insured, and under which these costs of defense are in addition to the face value of the policy, a reasonable defense allowance shall be added to the face value in calculating the outstanding value of the policy. This reasonable defense allowance shall be calculated by computing the ratio of defense costs to indemnity payments by the particular insured (including payments by the insured and payments by any of its insurers) in any asbestos-related disease cases and similar lawsuits that were disposed of before the enactment of this Act; and then by increasing the outstanding value of the insurance policy, as of the date of enactment, by the same ratio. Defense costs paid under the insurance policy before the date of enactment shall not reduce the outstanding value of such insurance policy; however, defense costs paid under the insurance policy after the date of enactment shall serve to reduce the outstanding value of the insurance policy.

(4) LIMITATIONS AND ADJUSTMENTS.—The calculation of the proportionate share of the assessment under paragraph (2) and the outstanding value under paragraph (3) shall be subject to the following limitations and adjustments:

(A) PRO-RATA POLICIES.—If any policy provides for pro-rate indemnity of only a fixed percentage of losses, then the adjusted value shall be the outstanding value multiplied by such percentage, and the assessment (under paragraph (2)) shall not exceed the gross assessment imposed on the insured (under subsections (a)(1) and (2)) multiplied by such percentage.

(B) EXCESS LIABILITY POLICIES.—If any policy covers only losses exceeding a fixed cumulative amount of losses suffered by the insured, the adjusted value of the policy shall be zero on an assessment due date if the cumulative losses suffered by the insured under the policy, plus all assessments against the insured before and on the assessment due date, are less than such amount. When the fixed cumulative amount under the excess liability policy is first exceeded, the insured's gross assessment shall be apportioned under subsection (a)(2) among the asbestos insurance policies in two stages—

(i) once for so much of the gross assessment on the insured as could be assessed and apportioned without exceeding the fixed cumulative amount, and

(ii) separately for the remainder of the gross assessment on the insured—and the adjusted value of the policy shall be zero for the first of the two stages.

Thereafter, the policy shall be assessed its proportionate share as specified under paragraph (2).

(C) ASSESSMENTS ADJUSTED BY AGREEMENT.—The insured and the insurer under any asbestos insurance policy may enter into an agreement adjusting their assessments under this section, if the insured and the insurer each agrees to pay an assessment, such that the aggregate of the amounts paid by both of them equals at least the amount that would otherwise be assessed against them under this section. At the discretion of the insured and the insurer, any such agreement may also provide a method of calculating the outstanding value of the policy other than the one set forth in paragraph (3), or adjusting any other terms of the policy that are relevant to the calculations under this section. An agreement under this subparagraph (C) shall take effect when concurred in by the Secretary of the Treasury, who shall concur in any agreement submitted that satisfies the conditions of this subsection.

(5) REINSURANCE, ETC.—Assessments imposed under this subsection against an asbestos insurance policy and paid by the insurer shall for all purposes, including reinsurance, be deemed to be payments made under the insurance policy.

(6) "ASBESTOS INSURANCE POLICY" DEFINED.—For purposes of this subsection (d), the term "asbestos insurance policy" means any policy under which—

(A) the insurer is a commercial insurance carrier; and

(B) the policy provides indemnity for claims against (i) an asbestos defendant liable for an assessment under subsection (a), including any such asbestos defendant from which the assessment is uncollectible or that has ceased to exist; or (ii) any person included under section 301(a)(2)(B) or (E) (relating to parents, subsidiaries, officers, employees, etc.) because of a relationship with such an asbestos defendant; or (iii) any predecessor or successor to such an asbestos defendant; or any parent of such predecessor, successor, or asbestos defendant; and

(C) the claims indemnified under the terms of the policy would include a claim (other than under a workers' compensation law) for bodily injury arising from occupational exposure to asbestos that occurred, or from any disease, disability, death, or other purported consequence of the exposure that developed, at any time after January 1, 1935.

(e) ASSESSMENTS FROM BANKRUPT COMPANIES, SUCCESSORS, ETC.—

(1) "ASSESSABLE COMPANY" DEFINED.—For purposes of this subsection (e), an "assessable company" shall mean any asbestos defendant or any insurer

under an asbestos insurance policy (as defined in subsection (d)(6)), including any company that has ceased to exist.

(2) CHAPTER 7 AND OTHER LIQUIDATION PROCEDURES.—

(A) WHEN APPLICABLE.—The provisions of subparagraphs (B), (C), and (D) shall apply—

(i) in the event that an assessable company files a petition for relief under title 11, United States Code, chapter 7 (relating to liquidation under the Bankruptcy Code), or under chapter 11 of such title (relating to reorganization under the Bankruptcy Code) in a case that is converted to a case under chapter 7 of such title;

(ii) in the event that an order for relief under section 303(h) of such title is issued against an assessable company in an involuntary case under chapter 7 of such title, or under chapter 11 of such title in a case that is converted to a case under chapter 7 of such title;

(iii) in the event that an assessable company initiates any procedure under any applicable State, Federal (other than the Bankruptcy Code), or foreign law that may result in dissolution or total liquidation of the assessable company; or

(iv) in the event that an order for relief or similar order is issued under such a procedure against an assessable company.

(B) ACCELERATION.—

(i) The future obligations of the assessable company to pay assessments under this section, for the period commencing on the date such chapter 7 petition is filed, or the case under such chapter 11 is converted to a case under such chapter 7, or the procedure under other law is initiated, and extending thereafter 45 years, shall be accelerated automatically. The present value of such accelerated amount shall be treated for all purposes as having been due and payable immediately before the filing of the bankruptcy petition or the initiation of the procedure under other law.

(ii) For purposes of determining the amount of the accelerated obligation, the Secretary is authorized to estimate the present value of the amount of the assessments under this section that the assessable company would be required to pay during the relevant 45-year period. In making this estimate, the Secretary shall consider the past experience of the Trust Fund, anticipated obligations of the Fund during the relevant 45-year period based on the best available epidemiological data, and other appropriate data and actuarial projections; and shall calculate present value by applying the rate of interest established under section 6621 of the Internal Revenue Code of 1954 (26 U.S.C. 6221) as of the date on which the bankruptcy petition is filed or the procedure under other law is initiated. In estimating the present value of the assessable company's obligation for any years during the relevant 45-year period, the Secretary shall assume that expenditures from the Trust Fund will not be so high as to render insufficient the amounts authorized and appropriated under section 202 of this Act.

(iii) The Secretary is further authorized to file with the United States Bankruptcy Court or other appropriate court or administrative agency a proof of claim for the estimated amount of the accelerated obligation that has not yet been paid, plus any unpaid assessment under this section that was due and payable before the date the bankruptcy petition was filed or the procedure under other law was initiated.

(iv) The Secretary shall maintain the accelerated amount paid by the assessable company in a separate book account in the Trust Fund, invested and bearing interest as provided in section 203(a)(3) of this Act; and shall move from this account to the general account of the Trust Fund, at least annually, the amount of the assessable company's unaccelerated assessment determined under the terms of subsection (a) or (b). If the assessable company's unaccelerated obligation to contribute terminates before the account is depleted, the Secretary shall refund the balance to the assessable company or its estate for distribution to creditors and interest holders.

(C) PRIORITY STATUS.—The unpaid amounts of any assessments under this section due and payable by the assessable company before the date the bankruptcy petition is filed plus all amounts accelerated under this subsection shall be afforded, for all purposes under the Bankruptcy Code, the priority status provided for in section 507(a)(6) of title 11, United States Code.

(D) NULLIFICATION OF ACCELERATION UPON DISMISSAL.—The acceleration under subsection (A) shall be automatically and retroactively nullified upon—

(i) the entry of a final, non-appealable order dismissing the case under such chapter 7 or converting the case under such chapter 7 to a case under such chapter 11; or

(ii) the final, non-appealable dismissal or other final, irreversible action concluding a procedure under other applicable law that results neither in the dissolution nor in the total liquidation of the assessable company, or that results in the establishment of a successor or successors to the assessable company that are adequately capitalized and otherwise obligated and able to pay, when due, the assessments that will be imposed under this section against the assessable company.

(3) CHAPTER 11 REORGANIZATION.—

(A) WHEN APPLICABLE.—The provisions of subparagraphs (A), (B), and (C) shall apply in the event that an assessable company files, or has filed against it, a petition for relief under such chapter 11, or in the event that a case under such chapter 7 filed by or against an assessable company is converted to a case under such chapter 11.

(B) PRIORITY STATUS.—

(i) The unpaid amount of any assessment under this section due and payable by the assessable company prior to the date the bankruptcy petition is filed shall be afforded, for all purposes under the Bankruptcy Code, the priority status provided for in section 507(a)(6) of such title.

(ii) Any assessments under this section due and payable by the assessable company after the date the bankruptcy petition is filed but prior to confirmation of a chapter 11 plan under section 1129 of such title 11 or conversion of the case to one under such chapter 7 shall be treated as an administrative expense arising in the ordinary course of business and afforded, for all purposes under the Bankruptcy Code, the priority status provided for in section 503(b)(1) of such title.

(C) NO DISCHARGE.—Any assessments due and payable by the assessable company after confirmation of its chapter 11 plan under section 1129 of such title shall be deemed to arise after the confirmation, and shall therefore be nondischargeable under section 1141(d)(1)(A) of such title and shall survive against the assessable company and any successor or successors to the assessable company under the plan.

(D) ACCELERATION UNDER LIQUIDATION PLAN.—If a chapter 11 plan provides for the liquidation of all or substantially all of the assets of the assessable company, as provided in section 1121(b)(4) of such title, then the court shall not confirm the plan under such title unless either—

(i) the plan provides for payments in satisfaction of—

(I) future assessments as though they were automatically accelerated under paragraphs (2)(A) and (B) and were due and payable immediately prior to the filing of the petition, less assessments paid during the course of the case under subparagraph (A)(ii) as an expense of administration, plus

(II) the unpaid amount of any assessments made prior to the date on which the petition was filed; or

(ii) the court finds and determines that a successor or successors to the assessable company under the plan are adequately capitalized and are obligated under the plan to pay, when due, the assessments that will be imposed upon the assessable company after confirmation of the plan.

(4) APPLICATION TO ONGOING AND FUTURE PROCEEDINGS.— Paragraphs (2) and (3) shall apply to any case under such chapter 7 or chapter 11 and to any procedure under other State, Federal, or foreign law initiated on or after the date of enactment of this Act; and shall also apply to any such case or procedure initiated before enactment of this Act except to the extent that, as of the date of enactment, any final, nonappealable order has been entered or any final, irreversible action taken allocating among creditors or interest holders the distribution of property of the estate. This subsection (e) shall apply according to its terms,

any provision of the Bankruptcy Code to the contrary notwithstanding.

(5) SUCCESSOR LIABILITY.—If some or all of an assessment under this section is uncollectible from an assessable company because the assessable company has ceased to exist or because the Secretary of the Treasury has exhausted the applicable collection procedures under this Act, the Internal Revenue Code of 1954, and the Bankruptcy Code, then any transferee of assets of the assessable company shall be liable for the assessment as the successor to the assessable company if one or more of the following conditions are met:

(A) ASSUMPTION.—The transferee expressly or impliedly agreed to assume the assessable company's liabilities, generally or specifically, including (without limitation) the responsibility for any tort or other liability related to compensating persons injured by occupational exposure to asbestos.

(B) CONSOLIDATION OR MERGER.—The transaction amounted to a consolidation or merger between the assessable company and the transferee, including (without limitation) a total liquidation of the assessable company into a parent corporation.

(C) CONTINUATION OF BUSINESS.—The transferee of all or substantially all of the assets of the assessable company is merely a continuation of the assessable company, including (without limitation) the result of a reorganization that involves a mere change in identity, form, or place of organization, however effected.

(D) BAD FAITH.—The transaction was entered into fraudulently or in bad faith to escape liability.

(f) INTEREST FOR NON-PAYMENT OF ASSESSMENT.—If any assessment is not paid by the due date, interest on the amount of such assessment at the rate imposed under section 6601(a) of the Internal Revenue Code of 1954 (relating to underpayment, non-payment, or extensions of time for payment of tax), shall be paid for the period from such due date to the date paid.

(g) STUDIES, REGULATIONS, INFORMATION SUBMISSION.—By no later than July 1, 1985, the Secretary of the Treasury shall (1) conduct studies that are necessary for determining the amounts of assessment allocation factors (under subsection (c)) and the ratios for apportioning assessments among asbestos insurance policies (under subsection (d)); and (2) promulgate whatever regulations are necessary to interpret and facilitate compliance with the assessments under this section. In conducting such studies, the Secretary may exercise the powers of sections 7602 through 7606 of the Internal Revenue Code of 1954 (relating to examination and inspection).

(h) PAYMENT WITHOUT PREJUDICE.—The payment of an assessment shall be without prejudice to the right of the person paying it to seek to recover some or all of the payment through administrative review of, or judicial challenge to, the assessment.

(i) TAX TREATMENT OF ASSESSMENTS.—

(1) ORDINARY AND NECESSARY BUSINESS EXPENSES.—

(A) DEDUCTIBLE EXPENSES AND LOSSES.—Assessments imposed under this section on an asbestos defendant shall constitute ordinary and necessary expenses incurred by the asbestos defendant in carrying on its trade or business, and assessments imposed under this section on an insurer under an asbestos insurance policy shall constitute losses incurred by the insurer on insurance contracts, for all purposes under the Internal Revenue Code of 1954.

(B) CONFORMING AMENDMENT.—Section 164(a) of the Internal Revenue Code of 1954 (relating to itemized deduction of taxes), is amended by adding after subsection (5) the following new subsection:

"(6) Asbestos-related disease assessments referred to in section 4711.".

(2) CONSIDERED TO BE TAXES.—

(A) AMENDMENT TO TREAT ASSESSMENTS AS EXCISE TAXES.—Subtitle D of the Internal Revenue Code of 1954 (relating to miscellaneous excise taxes) is amended by adding after chapter 38 the following new chapter:

"CHAPTER 39—ASBESTOS-RELATED DISEASE ASSESSMENTS

"SEC. 4711. TREATMENT OF ASBESTOS-RELATED DISEASE ASSESSMENTS AS EXCISE TAXES.

"All assessments imposed by provisions of section 201 of the Asbestos Workers' Recovery Act shall be considered to be taxes under this subtitle for all purposes under this title."

(B) CLERICAL AMENDMENT.—The table of chapters for subtitle D of the Internal Revenue Code of 1954 is amended by inserting after the item relating to chapter 38 the following new item:

"Chapter 39. Asbestos-Related Disease Assessments.".

SEC. 202. ASBESTOS-RELATED DISEASE TRUST FUND.

(a) ESTABLISHMENT OF TRUST FUND AND ACCOUNTS.—There is established in the Treasury of the United States a trust fund to be known as the "Asbestos-Related Disease Trust Fund" (referred to in this Act as the "Trust Fund"). The Trust Fund shall consist of a general account, the grants account referred to in section 205(d), and any additional separate accounts required to hold accelerated amounts of assessment under section 201(e)(2)(A)(iv) (relating to liquidation and dissolution). Each account shall contain such amounts as may be contributed, appropriated, or transferred to it as provided under this section and section 203.

(b) FUNDING OF THE TRUST FUND.—

(1) RECEIPTS.—The Secretary of the Treasury shall deposit into the general account of the Trust Fund the following amounts:

(A) ASSESSMENTS.—The entire amount of assessments paid under section 201 by asbestos defendants other than the United States.

(B) INTEREST.—Interest accrued and received under sections 201(f) and 203(a)(3).

(C) APPROPRIATIONS.—Amounts appropriated under paragraph (2).

(D) RECOVERIES.—Amounts recovered on behalf of the Trust Fund under section 203(c).

BEST COPY AVAILABLE

(2) APPROPRIATIONS.—There is hereby appropriated to the Trust Fund the following amounts:

(A) FEDERAL GOVERNMENT CONTRIBUTION.—On each assessment due date, the amount calculated under section 201(a) being the assessment imposed on the United States.

(B) REPAYABLE ADVANCES.—Advances, repayable as provided under section 203(b), equal to—

(i) INITIAL ADVANCE.—During the period between the effective date of this Act and July 1, 1985, such amounts as may be expended or transferred from the general account of the Trust Fund.

(ii) CASH FLOW ADVANCE.—Such amounts as may be expended or transferred from the general account of the Trust Fund during any period after July 1, 1985 during which the balance in the account is below $100,000. Appropriations under this division (ii) shall not be made for any such period in excess of 24 consecutive months.

(iii) ASSESSMENTS PENDING COLLECTION.—Any amounts of assessments that the Secretary of the Treasury determines are due and payable but have not yet been paid, but not including any amount referred to in section 201(b)(2)(C) (relating to assessments that have been determined to be uncollectible).

(3) AUTHORIZATION OF APPROPRIATIONS.—There are hereby authorized to be appropriated to the general account of the Trust Fund $150,000,000 for the 1986 fiscal year (beginning October 1, 1985) and the same amount for each fiscal year thereafter. Amounts authorized to be appropriated for the 1987 and 1988 fiscal years may be appropriated in advance of those years. Any amount authorized but not appropriated for one fiscal year shall be carried over and added to any amount authorized to be appropriated for the next fiscal year.

(c) PERMITTED EXPENDITURES.—Amounts in the Trust Fund shall be available only for the following:

(1) SUPPLEMENTAL BENEFITS.—Supplemental benefits awarded under title I and certified for payment under section 102(c)(1)(B) or 102(c)(2)(B).

(2) CERTAIN COSTS AND EXPENSES.—Reimbursement, certified for payment under sections 102(c)(1)(B), 102(c)(2)(B), and 304, of—

(A) administrative expenses of the Departments of Health and Human Services, the Treasury, Justice, or Labor,

(B) certain administrative costs and expenses of a State agency under section 102(c)(2)(B),

(C) costs and expenses referred to in section 203(c)(3) (relating to costs and expenses from pursuing claims on behalf of the Trust Fund), and

(D) expenses of prosecuting a claim for a supplemental benefit that are reimbursable under section 102(c)(1)(B).

(3) GRANTS AND CONTRACTS.—Amounts needed to fund grants and contracts that have been awarded under section 205.

SEC. 203. TRUST FUND ADMINISTRATION.

(a) MANAGEMENT OF TRUST FUND.—

(1) MANAGING TRUSTEE.—The Secretary of the Treasury or his or her designee shall be the "Managing Trustee" of the Trust Fund, and shall perform such duties with respect to managing the Trust Fund as are assigned to him or her under this Act or by the President.

(2) CONSERVATION OF ASSETS.—The Managing Trustee shall be charged with conservation of the assets of the Trust Fund. The Managing Trustee shall

promulgate regulations designating one or more Federal officials within the Department of the Treasury who may obligate money in the Trust Fund in accordance with section 202, who may settle or compromise claims against the Trust Fund, and who may initiate actions on behalf of the Trust Fund under subsection (c).

(3) INVESTMENT.—It shall be the duty of the Managing Trustee to invest such portion of the Trust Fund as is not, in his or her judgment, required to meet current withdrawals. The investments shall be in public debt obligations with maturities suitable for the needs of the Trust Fund and bearing interest at rates no less than the current market yields on outstanding marketable obligations of the United States of comparable maturities. The Trust Fund shall be invested as a single fund, but the Managing Trustee shall maintain a separate book account for each account that is part of the Trust Fund (as indicated in subsection 202(a)), and shall credit to each such account a proportionate part of the earnings of the Fund.

(4) REPORT.—The Managing Trustee shall report to the Congress for each fiscal year ending on or after September 30, 1985, on the financial condition and the results of the operations of the Trust Fund during such

fiscal year and on its future expected condition and operations.

(b) LOANS TO TRUST FUND.—Advances made pursuant to section 202(b)(2)(B) shall be repaid and interest on the advances shall be paid to the general fund of the Treasury when the Managing Trustee determines that monies are available for such purposes. Such interest shall be at the same rates as are earned by the investments under subsection (a)(3). Amounts actually advanced to the Trust Fund shall be charged, as of the date of the advance, against the limits on authorization of appropriations under section 202(b)(3), and such charge shall be nullified when the principal amount advanced is repaid.

(c) SUBROGATION BY TRUST FUND.—

(1) GENERAL.—

(A) Subject to section 301(a) (relating to the restriction on remedy), the Trust Fund shall be subrogated to the rights that any recipient of a supplemental benefit under title I may have to recover in respect of any liability for occupational exposure to asbestos of the affected person.

(B) In any case where the Trust Fund is barred by section 301(a) (relating to the restriction on remedy) from proceeding against and recovering from a person who is insured (or reinsured) and where the insurer (or reinsurer) is not protected by section 301(a) against recovery, the Trust Fund shall also be subrogated to such insured (or reinsured) person's rights and assume such person's liabilities to the extent such subrogation and assumption will enable the Trust Fund to proceed against and recover from the insurer (or reinsurer) directly.

(2) LIEN.—Upon payment of any amount of supplemental benefit with respect to any affected person, the Trust Fund shall have a lien against any future proceeds of any recovery by the affected person or any unremarried spouse or any child under age 18 of the affected person, as settlement or judgment in any claim or civil action, as payment under a plan of reorganization or upon liquidation, or otherwise, in respect of any liability referred to in paragraph (1)(A). The lien shall be in the amount of the payment of supplemental benefit, after deduction of reasonable and necessary expenditures (including attorney's fees) incurred in effecting the recovery.

(3) ACTIONS FOR RECOVERY.—The Managing Trustee may commence an action on behalf of the Trust Fund to recover any payment of a supplemental benefit from any person who is liable to the Trust

Fund under rights to which the Trust Fund is subrogated under this subsection, if the Managing Trustee determines, after consultation with the Trust Fund Committee established under section 204, that such action is necessary to conserve the assets in the Trust Fund, taking into account the likelihood and amount of recovery, the likely amount of administrative and adjudicatory costs and expenses to be charged against the Trust Fund, and any other relevant factors. The Managing Trustee shall apply similar considerations in determining whether to settle or terminate any such action once commenced. Administrative and adjudicative costs and expenses, including attorneys' fees if any, from pursuing any action under this subsection on behalf of the Trust Fund shall be paid from the general account of the Trust Fund.

SEC. 204. TRUST FUND COMMITTEE.

(a) ESTABLISHMENT.—

(1) COMPOSITION.—There is hereby created within the Department of the Treasury the Asbestos-Related Disease Trust Fund Conservation Committee (referred to in this Act as the "Trust Fund Committee") consisting of the following members. The Trust Fund Committee shall be chaired by the Managing Trustee, and shall include five public members who

shall be appointed by the President as follows: (A) one representing asbestos defendants, (B) one representing insurers who pay assessments under section 201(d), (C) one representing State workers' compensation programs, (D) one representing affected persons and other claimants, and (E) one representing employers of workers who suffer from asbestos-related diseases.

(2) APPOINTMENTS.—Public members of the Trust Fund Committee shall be selected upon the basis of their experience and competence in the fields of workers' compensation and occupational health and safety. Such members shall be appointed for terms of two years (provided that the initial terms of the member under paragraphs (1)(B) and (E) shall be for one year only) and shall be removable only for cause. Such members shall be appointed without regard to the provisions of title 5, United States Code, governing appointments in the public service. The President shall appoint the public members within 3 months after the date of enactment of this Act.

(3) COMPENSATION.—Members of the Trust Fund Committee who are not regular full-time employees of the United States shall receive no salary, but shall be reimbursed by the Secretary of the Treasury

for reasonable and necessary traveling and other expenses incurred in the discharge of their official duties.

(b) RESPONSIBILITIES.—Members of the Trust Fund Committee shall—

(1) consult with the Secretaries of Health and Human Services and the Treasury with respect to practices and procedures for disposition of claims against the Trust Fund, and for that purpose shall have the authority to review all claims against the Trust Fund;

(2) instruct the Managing Trustee with respect to the awarding of grants and contracts under section 205;

(3) consult with the Managing Trustee with respect to any contemplated action under section 203(c) (related to recovery by the Trust Fund);

(4) review and consult with responsible officials on any matters relating to the administration and conservation of the Trust Fund generally;

(5) review and inspect all books and accounts relating to the Trust Fund;

(6)(A) monitor and analyze the nature of the supplemental benefits claims filed and the nature of the assessments paid under section 201, to determine whether application of the standards and procedures in and developed under section 201 result in contributions to the Trust Fund that are (i) sufficient so that the Trust Fund can meet its obligations and (ii) equitably apportioned among the businesses, the United States, or other entities on which the assessments will be imposed; and

(B) report to the Secretary of the Treasury and to Congress on the Trust Fund Committee's determinations under subparagraph (A), with proposed recommendations for amendment to the standards and procedures in and developed under section 201, whenever necessary but no less than once every 5 years;

(7) perform such other responsibilities as may be assigned to them by the Managing Trustee; and

(8) annually prepare and submit to Congress a report on the Trust Fund Committee's performance of its responsibilities under this section.

(c) ADMINISTRATION.—

(1) REGULATIONS.—The Secretary of the Treasury shall promulgate regulations that shall govern the operations of the Trust Fund Committee. Such regulations shall require compliance with the provisions of the Federal Advisory Committee Act (5 U.S.C. App. I) only to the extent that such compliance is deemed

necessary to the effective functioning of the Committee.

(2) PERSONNEL.—The Secretary of the Treasury shall furnish to the Trust Fund Committee an executive secretary and such other personnel and other services (including services of consultants obtained by contract) as are necessary to the conduct of its business.

SEC. 205. GRANTS AND CONTRACTS FOR PROGRAM IMPROVEMENT.

(a) GENERAL AUTHORITY.—The Trust Fund Committee (established under section 204), with the advice and assistance of the Secretary of Labor, is authorized to instruct the Managing Trustee to award grants and contracts to any eligible organization. For purposes of this section, "eligible organization" means a State or interstate agency, a municipality, educational institution, medical institution, and any other organization that is capable of effectively carrying out a project that may be funded by grant or contract under subsection (b), except that no private for-profit organization shall be an eligible organization.

(b) PURPOSES.—Grants or contracts may be awarded to pay up to two-thirds of the cost of planning, developing, establishing, or improving, and up to one-half of the cost of maintaining, any of the following kinds of programs:

(1) GENERAL STATE PROGRAM IMPROVEMENT.—Research, demonstration, or pilot projects conducted by State workers' compensation agencies to assist them in improving their capacities to make eligibility determinations concerning workers' compensation claims with respect to asbestos-related diseases.

(2) SPECIALIST TRAINING, ETC.—Training programs, hospital- or university-based medical panels, or other projects, to help assure that specialists are available to assist with difficult questions of diagnosis of asbestos-related diseases or other medical matters as they arise before State or Federal agencies.

(3) MEDICAL ASSESSMENT EVALUATION UNITS.—Medical assessment evaluation units, to be comprised of medical experts and to be under the control and supervision of the State workers' compensation agencies, to determine the occupational sources of asbestos-related diseases and to address issues of causation of deaths or impairments that may be caused by a combination of factors.

(4) MEDICAL TREATMENT RESEARCH.—Research into the causes, diagnosis, treatment, and prevention of asbestos-related diseases.

(c) PROCEDURES.—A grant or contract under this section may be made only upon application to the Secretary of

Labor at such time or times and containing such information as the Secretary may prescribe. Before the Trust Fund Committee awards a grant or contract, the Secretary of Labor shall obtain assurances that the recipient intends to, and has the capability to, fulfill the purposes for which the award is made. The Secretary shall provide the Trust Fund Committee with copies of all eligible applications, and shall provide the Committee with his or her recommendations as to which should be approved. In the event that the Trust Fund Committee, upon the recommendation of the Secretary, determines that a grant or contract is not being used for the purposes for which it was awarded, the Secretary shall notify the recipient, who shall promptly return to the Committee any amounts not yet spent.

(d) FINANCE.—At the end of each fiscal year, the Managing Trustee shall transfer from the general account of the Trust Fund to the grants account of the Trust Fund the amount equal to 0.50 percent of the amount withdrawn during the fiscal year from the general account under section 202(c)(1) for the payment of supplemental benefits. Funding for grants and contracts under this section shall be drawn exclusively from the grants account.

TITLE III—MISCELLANEOUS

SEC. 301. THIRD-PARTY AND TORT ACTIONS.

(a) EXCLUSIVE REMEDY.—

(1) GENERAL RULE.—On and after the effective date of this Act, the remedy provided under title I (relating to supplemental benefits) and under applicable workers' compensation programs shall, to the extent provided in paragraph (2), be the exclusive remedy for occupational exposure to asbestos.

(2) PERSONS PROTECTED.—Except for any liability under a workers' compensation law, the following persons shall not, under any circumstances or in any capacity, bear any liability for occupational exposure to asbestos:

(A) TRUST FUND CONTRIBUTORS.—Any asbestos defendant obligated under section 201(a) to pay an assessment to the Trust Fund and any insurer obligated under section 201(d) to pay an assessment to the Trust Fund.

(B) PARENTS, SUBSIDIARIES, ETC.—Any person that is a parent or subsidiary of, or otherwise under common ownership or control with, or successor to, a person protected under subparagraph (A), (B), (C), or (E), regardless of whether any such person is domestic or foreign. With regard to any person who is not protected by the immunity provided under subparagraph (A) or subparagraph (C) through (E), the immunity against suit provided under this subsection (B) shall not serve to protect the person against liability arising out of its own extraction, production, manufacture, construction, importation, sale, or use of asbestos or asbestos-containing products if such activity is wholly independent of any activity of the person referred to in subparagraph (A), (B), (C), or (E).

(C) DISTRIBUTORS, USERS, ETC.—Any person engaged in the distribution, sale, or use of any asbestos or asbestos-containing product, but who is not an asbestos defendant (who are governed by subparagraph (A) rather than this subparagraph).

(D) COLLECTIVE BARGAINING AGENTS.—Any collective bargaining agent.

(E) EMPLOYEES, CONSULTANTS, ETC.—Any past or present employee, officer, director, agent, or shareholder of, or designer for or other consultant to, any person protected under subparagraphs (A) through (E).

(3) PERMANENT APPLICATION OF RESTRICTION ON REMEDY.—Once full payment of the supplemental benefit award authorized under the terms of this act has been made under section 101(c)(2), the restriction

on remedy under this subsection (a) shall apply permanently, notwithstanding any circumstance referred to in section 302(b) (relating to nullifying circumstances) or any other circumstance whatsoever.

(4) ACTIONS AFFECTED; EFFECTIVE DATE.—The restriction on remedy under this subsection (a) shall apply to all actions pending on or commenced after the effective date of this Act. For such purposes, an action is "pending" if it has been commenced and has not yet been terminated by a final, non-appealable order or judgement.

(b) REMOVAL OF JURISDICTION.—After the effective date of this Act, no State or Federal administrative or judicial tribunal shall have jurisdiction to adjudicate, or to continue to adjudicate, against any person referred to in subsection (a)(2), any claim of liability for occupational exposure to asbestos.

(c) SUPERSESSION OF INCONSISTENT LAW.—The provisions of this section shall apply in any judicial or administrative proceeding notwithstanding any contrary provision of State or Federal law, and such contrary provisions are hereby superseded to the extent inconsistent with the provisions of this section, except that the limitations on remedy and jurisdiction in subsections (a) and (b) shall be in addition to, and shall not supersede, any limitations on remedy or liability or jurisdiction under any workers' compensation or other law.

SEC. 302. SEPARABILITY; NULLIFYING CIRCUMSTANCES.

(a) SEPARABILITY.—Except as provided under subsection (b), if any provision of this Act or its application to any person or circumstance shall be held invalid, the application of such provision to other persons or to other circumstances, and the application of the remainder of this Act shall not be affected thereby.

(b) NULLIFYING CIRCUMSTANCES.—

(1) JUDICIAL INVALIDATION.—Subject to section 301(a)(3), this entire Act shall be null and void if any provision or provisions of this Act or section 4711 of the Internal Revenue Code of 1954, are adjudged unconstitutional on their face or their applicability to any persons or circumstances is adjudged invalid so as to render any of the following elements of the legislation substantially ineffectual:

(A) provision of supplemental benefits (sections 101 and 102);

(B) imposition of assessments on asbestos defendants, and provision for collecting those assessments and making the proceeds available to fund supplemental benefits (sections 201(a) and 202));

(C) imposition of assessments on insurance carriers, and provision for collecting those assessments and making the proceeds available to fund supplemental benefits (sections 201(d) and 202); or

(D) the restriction on remedy (section 301(a)).

(2) INSUFFICIENT FUNDING.—This entire Act shall be null and avoid if—

(A) the balance in the general account of the Trust Fund is depleted, and expenditures required under this Act have therefore been delayed for 120 days not counting any days on which either House of Congress is not in session; or

(B) the United States for any reason delays paying to the Trust Fund the amounts required under section 201(a) and 201(c)(2)(B) for 120 days not counting any days on which either House of Congress is not in session.

(3) RULINGS.—Promptly after any judicial decision invalidating all or any portion of this Act or any judicial decision affecting a prior such decision, and at other times as circumstances may require, the Secretary of the Treasury in consultation with the Attorney General shall issue and publish in the Federal Register

a ruling as to which, if any, nullifying circumstances set forth under subsection (1) or (2) have occurred, and the consequence of such occurrence with respect to implementation of this Act by the United States. Any such ruling shall be issued under procedures for informal rulemaking under section 553 of title 5, United States Code.

SEC. 303. ADMINISTRATIVE AUTHORITY AND JUDICIAL REVIEW.

(a) AUTHORITY TO DELEGATE AND ISSUE REGULATIONS.—The President and the Secretaries of Health and Human Services, the Treasury, Justice, and Labor are each authorized—

(1) to delegate and assign any duties or powers imposed upon or assigned to him or her under this Act, and

(2) to promulgate any rules or regulations necessary to carry out the provisions of this Act.

(b) JUDICIAL REVIEW.—

(1) REVIEW OF ADMINISTRATIVE ACTION.—A petition for review of any final action taken in issuing any rule or regulation under this Act, in including a disease on or omitting a disease from the list of asbestos-related diseases or in taking any other action under section 104(b), in issuing any Guidance Document

under section 104(d), or in rendering any ruling under section 302(b)(3) (relating to nullifying circumstances), may be filed only in the United States Court of Appeals for the District of Columbia Circuit. A petition for review of any final action taken under section 102(d) (relating to determination of the State-wide average weekly wage) may be filed only in the United States Court of Appeals for the circuit in which the State is located. Any petition for review under this subsection shall be filed within sixty days from the date notice of final action appears in the Federal Register, except that if the petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

(2) DISPUTES INVOLVING ASSESSMENTS OR CONSTITUTIONALITY.—

(A) ESTABLISHMENT OF SPECIAL COURT.—Any judicial proceedings (except for those governed by paragraph (1)) arising under or relating to section 201 (relating to assessments) or construing the constitutionality of this Act shall be brought only in a single, three-judge district court of the United States that shall be established in the District Court for the District of Columbia (referred to in this paragraph as the "special court"). The special court is authorized to exercise the powers of a district judge in any judicial district with respect to such proceedings. The special court may issue rules for the conduct of any proceedings under this paragraph.

(B) JURISDICTION OF SPECIAL COURT.—Any civil action arising under or relating to section 201, or any action that may be appropriate to construe the constitutionality of any provision of or action under this Act shall be within the original and exclusive jurisdiction of the special court, notwithstanding any other provision of law. The special court may stay or enjoin any proceeding in any State court or court of the United States other than the Supreme Court if such action or proceeding is contrary to any provision of this paragraph (2), impairs the effective implementation of section 201, or interferes with the execution of any order of the special court. The special court shall not decline jurisdiction to issue declaratory judgments on account of the pendency of any other action in any other court.

(C) ADMINISTRATION.—The special court may appoint and fix the compensation and assign the duties of such special masters as it considers necessary or appropriate to conduct hearings, receive evidence and report thereon to the special court, and perform such other acts as the special court may require. The special court may employ such special masters by contract or otherwise, without regard to section 3709 of the Revised Statutes (41 U.S.C. 5) or to part III of this Act, on such terms and conditions as it may determine. Such special masters shall not be deemed to be employees of the United States or any department, agency, or instrumentality thereof. The special court may also appoint employees in such number as may be approved by the Director of the Administrative Office of the United States Courts, and may procure such administrative services as may be necessary for it or the special masters to complete their assignments expeditiously. There are authorized to be appropriated such sums as are necessary to carry out the purposes of this subsection. Sums appropriated under this subsection are authorized to remain available until expended.

SEC. 304. ADMINISTRATIVE COSTS AND EXPENSES.

All costs and expenses of administering this Act shall be paid for out of the Trust Fund. At least once during each fiscal year or promptly thereafter, the Secretaries of Health and Human Services, the Treasury, Labor and Justice shall each analyze his or her respective costs and expenses necessary to administer this Act, and the reimbursable costs and expenses of State agencies exercising delegated authority under section 102(d)(2); and the Secretaries shall each certify the results of this analysis to the Managing Trustee, who shall determine and reimburse the amounts of such costs and expenses.

SEC. 305. CERTAIN LANGUAGE INCLUDED FOR CONVENIENCE.

The subject headings applied to titles, sections, and certain subsections and lesser divisions of this Act, and the parenthetical language following certain cross-references in which the words "relating to" are used, are included only for convenience and shall be given no legal effect.

SEC. 306. EFFECTIVE DATE.

Except as otherwise provided in this Act, all provisions of this Act shall be effective on the date of enactment of this Act.

○

I

99TH CONGRESS
1ST SESSION

H. R. 3090

To provide for the compensation of individuals who are disabled as a result of occupational exposure to toxic substances and processes to regularize the fair, adequate, and equitable compensation of certain occupational disease victims, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JULY 26, 1985

Mr. WILLIAMS introduced the following bill; which was referred to the Committee on Education and Labor

NOVEMBER 19, 1985

Additional sponsors: Mr. HAWKINS, Mr. CLAY, Mr. FORD of Michigan, Mr. ATKINS, Mr. DONNELLY, Mr. KILDEE, Mr. MARTINEZ, Mr. LOWRY of Washington, Mrs. COLLINS, Mr. RANGEL, Mr. CONYERS, Mr. MITCHELL, Mr. CROCKETT, Mr. MATSUI, Mr. OBERSTAR, Mr. OWENS, Mr. EVANS of Illinois, Mr. MARKEY, Mr. WEISS, and Mr. BARNES

A BILL

To provide for the compensation of individuals who are disabled as a result of occupational exposure to toxic substances and processes to regularize the fair, adequate, and equitable compensation of certain occupational disease victims, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

This Act, together with the following table of contents, may be cited as the "Occupational Disease Compensation Act of 1985".

TABLE OF CONTENTS

Sec. 1. Short title; table of contents.
Sec. 2. Findings and purposes.
Sec. 3. Definitions.
Sec. 4. Exclusivity and Applicability.
Sec. 5. Compensation for disability or death.
Sec. 6. Eligibility for compensation.
Sec. 7. Procedure for making claims.
Sec. 8. Procedure for adjudication of claims.
Sec. 9. Appeals.
Sec. 10. Exclusive Federal Occupational Disease Workers Compensation Insurance Fund.
Sec. 11. Payment of compensation.
Sec. 12. Representation fees.
Sec. 13. Employment or coverage discrimination.
Sec. 14. Surveillance and medical treatment research.
Sec. 15. Additional coverage of occupational diseases.
Sec. 16. Administration by Office of Workers' Compensation Programs and Benefits Review Board.
Sec. 17. Administrative provisions for insurance fund.
Sec. 18. Enforcement authority.
Sec. 19. Recordkeeping.
Sec. 20. Education grants.
Sec. 21. Separability.
Sec. 22. Effective date.

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—The Congress finds that—

(1) many harmful substances and physical agents are in wide industrial and commercial use throughout the United States;

(2) a significant number of workers suffer disability or death or both from occupational diseases caused by the exposure to these substances and physical agents;

(3) the tragic proliferation of diseases related to occupational exposure to substances and physical agents results in intolerable human suffering;

(4) diseases arising from occupational exposure to substances and physical agents constitute a substantial burden upon interstate commerce and have an adverse effect on the public welfare;

(5) diseased and disabled workers and their survivors deserve, and the public interest will be best served by, prompt, adequate, and equitable compensation of workers with such diseases;

(6) workers' compensation laws governing occupational disease and disability do not in many cases provide prompt, adequate, and equitable compensation nor do they provide the incentives to reduce hazards in the workplace;

(7) occupational disease is often visited upon the families of workers;

(8) the inability of victims of such diseases to obtain adequate workers' compensation benefits places great strain on the family resources of the victims, and on public medical and income support systems and many workers and their families who are eligible under existing compensation laws are often unaware of their

rights and are therefore overly dependent on third party assistance;

(9) the general inability of workers' compensation laws to provide prompt, adequate, and equitable compensation to occupational disease victims has encouraged those victims to seek compensation through liability suits and other judicial action; and

(10) a rational approach for compensation for occupational diseases and disability that is based on the increased risk resulting from occupational exposure to substances and physical agents will advance the objective of comprehensive reform of workers' compensation laws governing occupational disease.

(b) PURPOSE.—It is the purpose of this Act—

(1) to establish a rational, effective workers' compensation law to provide prompt, adequate, and equitable compensation to—

(A) any worker disabled by disease resulting from workplace exposure to toxic substances; and

(B) dependents of a deceased worker whose death from disease related to workplace exposure to toxic substances and processes; and

(2) to provide a mechanism for reducing litigation resulting from death or disability due to occupational diseases.

SEC. 3. DEFINITIONS.

For the purposes of this Act—

(1) The term "asbestos" means chrysotile, amosite, and crocidolite and, when found in fibrous form, tremolite, anthrophyllite, and actinolite.

(2) The term "Board" means the Benefits Review Board established under section 21 of the Longshore Act.

(3) The term "Panel" means the Risk Assessment Panel established under section 15 of this Act.

(4) The term "claimant" means a person who seeks compensation under this Act, including an employee, a survivor of an employee, or a dependent.

(5) The term "compensation" means benefits made available under this Act to a disabled employee or to the survivors of deceased employees, and shall include, but not be limited to—

(A) "monetary benefits" paid to disabled employees, or survivors of deceased employees; and

(B) "medical benefits" including payments for or the provision of the services of physicians, hospital care, nursing, ambulance, prosthetic devices, and other related services, drugs, and medicines.

(6) The term "employee" means any individual who is employed by an employer, or who was employed by an employer.

(7) The term "employer" means any person engaged in commerce or in an industry affecting commerce, but shall not include the United States.

(8) The term "dependent" means any spouse or child of an employee.

(9) The term "insurance carrier" means any stock company, mutual company or association, any other person or fund, or State compensation insurance fund which is authorized under the laws of the United States or any State to engage in the business of writing insurance; or any stock company, mutual company or association, any other person or fund, or State compensation insurance fund.

(10) The term "Longshore Act" means the Longshore and Harbor Worker's Compensation Act (33 U.S.C. 901 et seq.).

(11) The term "national average weekly wage" means the gross average weekly earnings of production or nonsupervisory workers on private nonagricultural payrolls, as determined and published by the Bureau of Labor Statistics.

(12) The term "national construction average weekly wage" means the gross average earnings of production or nonsupervisory workers on private nonagricultural payrolls: construction, as determined and published by the Bureau of Labor Statistics.

(13) The term "national manufacturing average weekly wage" means the gross average weekly earnings of production or nonsupervisory workers on private nonagricultural payrolls: manufacturing, as determined and published by the Bureau of Labor Statistics.

(14) The term "Office of Workers' Compensation Programs" means that agency of the United States Department of Labor which is established to receive, process, and pay workers' compensation claims under the various Federal laws of workers' compensation.

(15) The term "Fund" means the Exclusive Federal Occupational Disease Workers Compensation Insurance Fund established pursuant to section 10(a).

(16) The term "Secretary" means the Secretary of Labor or the Secretary's designee.

(17) The term "State workers' compensation law" means the law or laws of a State which provide compensation for death or disability resulting from injuries (including diseases) arising out of and in the course of

employment or other similar test of work relatedness applicable under such law.

(18) The term "toxic substance or process" means (A) asbestos or (B) such other harmful substance or physical agent as may be designated by the Secretary pursuant to section 15 of this Act.

(19) The term "toxic substance market participant" means—

(A) a present or former manufacturer, mine operator, processor, refiner, importer, or distributor of asbestos or of a product containing asbestos, or other enterprise involved at any stage in the commercial or industrial production of asbestos; or

(B) as designated by the Secretary pursuant to section 15, a present or former manufacturer, mine operator, processor, distributor, importer, refiner, grower, or other enterprise involved at any stage in the commercial or industrial production of a toxic substance designated by the Secretary pursuant to such section.

SEC. 4. EXCLUSIVITY AND APPLICABILITY.

(a) EXCLUSIVE REMEDY.—(1) Except as otherwise provided in this Act, the compensation to which a claimant is entitled under this Act is compulsory and nonelective and shall constitute the claimant's exclusive remedy with respect to any employer of the claimant, any such employer's insurance carrier, or any collective bargaining agent of such employer's employees, and any employee, officer, director, or agent of such employer, insurance carrier or collective bargaining agent for any disability or death arising out of and in the course of the employee's employment due to exposure to asbestos or other toxic substance. However, the compensation to which a claimant is entitled under this Act shall not constitute the exclusive remedy with respect to any party other than a party described in this subsection (hereafter referred to as a "third party").

(2) The provisions of paragraph (1) of this subsection shall not operate to terminate any lawsuit pending on the effective date of this Act which was brought by an employee or his heirs or legal representatives against such employee's employer. In addition, the provisions of paragraph (1) of this subsection shall not preclude a suit from being brought after the effective date of this Act by an employee or his heirs or legal representatives against the employee's employer if such suit claims that the employer, with knowledge of the health hazard or hazards associated with exposure to asbestos or any other toxic substance or substances, nonetheless intentionally or with reckless indifference exposes its employees to

unsafe levels of asbestos or any other toxic substance or substances.

(b) APPLICABILITY.—(1)(A) Subject to the provisions of this Act, and notwithstanding any other law, a claim for compensation may be filed under this Act for compensation for death or disability which arose out of and in the course of employment due to exposure to asbestos or another toxic substance, and which death or disability occurred at any time prior to the effective date of this Act.

(B) Upon the award of compensation on any claim for compensation permitted pursuant to subparagraph (A), compensation shall be provided to the claimant in accordance with the provisions of section 5, and such compensation shall be paid retroactively to the date of death or of onset of such disability.

(2) Subject to the provisions of this Act, but notwithstanding any other law, a claim for compensation may be filed under this Act for compensation for death or disability which arises out of and in the course of employment due to exposure to asbestos or other toxic substance, and which death or disability occurs on or after the effective date of this Act.

(3) For the purpose of applying the provisions of this subsection with respect to a toxic substance which is designated pursuant to section 15, the term "effective date of this

Act" shall be construed to mean the effective date of such designation.

(c) INDEMNIFICATION AND CONTRIBUTION BARRED.—Neither any third party nor the Fund may maintain any action under any theory of liability against any party immune from suit by a claimant by reason of subsection (a) of this section for indemnification, contribution, or other monetary damages based on the liability of such third party or the Fund to any claimant as a result of any action described in this subsection.

(d) LIENS ON THIRD PARTY JUDGMENTS BARRED; REDUCTION FOR BENEFITS.—No employer, insurance carrier, or the Fund shall have a lien upon any judgment rendered in any third party liability action brought by an employee or dependent as a result of any disability or death arising out of and in the course of employment with such employer, nor any right of subrogation in connection with any such third party liability action. Any monetary benefits for death or disability received by the claimant by virtue of a third party liability action shall be reduced by the amount of any monetary benefits received under this Act.

(e) INAPPLICABILITY TO CLAIMS COVERED BY OTHER FEDERAL COMPENSATION LAWS.—This Act shall not apply with respect to claims which would otherwise be covered under the Longshore Act (33 U.S.C. 901 et seq.), chapters

81 and 83 of title 5, United States Code, or the Act of April 22, 1908, popularly known as the Employers Liability Act (45 U.S.C. 51 et seq.).

SEC. 5. COMPENSATION FOR DISABILITY OR DEATH.

(a) DEATH AND DISABILITY COVERAGE.—Compensation shall be available under this Act for death, and for disability, either total or partial, whether permanent or temporary in nature.

(b) MONETARY BENEFITS FOR TOTAL DISABILITY.—(1) Monetary benefits payable for total disability under this Act shall be paid from the date of onset of the disabling condition, and shall continue to be paid for the duration of such disabling condition, subject to the provisions of subsection (f) of this section, at a rate, per week, equal to the greater of—

(A) 66⅔ percent of the claimant's average weekly wage (subject to a maximum of 200 percent of the national average weekly wage) for the month in which the onset of the disability occurred; or

(B) 80 percent of the national manufacturing average weekly wage for the month in which the onset of the disability occurred.

(2) If the predominant exposure of the employee to a toxic substance was during the course of that employee's employment in the construction industry, monetary benefits for

total disability shall be paid at a rate, per week, equal to the greater of—

(A) 66⅔ percent of the claimant's average weekly wage (subject to a maximum of 200 percent of the national average weekly wage) for the month in which the onset of the disability occurred; or

(B) 80 percent of the national construction average weekly wage for the month in which the death or the onset of the disability occurred.

(c) MONETARY BENEFITS FOR DEATH.—(1) Monetary benefits payable for the death of an employee under this Act shall be the amount which the disabled worker was receiving per week in monetary benefits for total disability at the time of death (pursuant to the provisions of subsection (b) of this section).

(2) If the employee was not receiving total disability benefits at the time of death, monetary benefits payable for the death of an employee under this Act shall be the greater of—

(A) 66⅔ percent of the employee's average weekly wage (subject to a maximum of 200 percent of the national average weekly wage); or

(B) 80 percent of the national manufacturing average weekly wage for the month in which the death occurred, or the national construction average weekly wage for such month, whichever is applicable consistent with the provisions of subsection (b) of this section.

(3) In computing "average weekly wages" the Secretary shall use average weekly wages at onset of disability (or death, as applicable) plus the percentage increase, if any, in the national manufacturing average weekly wage or the national construction average weekly wage, as applicable, from date of onset of the disability until the date on which a compensation award is made.

(4) Such monetary benefit for the death of an employee shall be payable to the surviving spouse of the deceased employee, except that—

(A) if there are one or more surviving children less than twenty-one years of age, or one or more surviving children who are physically or mentally incapable of self-support at the time of the death of the employee, 50 percent of such monetary benefit shall be payable to such surviving child or children (share and share alike); and

(B) if there is no surviving spouse, the monetary benefit payable to any such surviving children shall include the amount which would otherwise have been payable to such surviving spouse.

(d) MONETARY BENEFITS FOR PARTIAL DISABILITY.—(1) Monetary benefits payable for partial disability under this Act for employees shall be that percentage of the monetary benefits which would be payable for total disability (pursuant to subsection (b) of this section) which is equal to the greater benefit determined—

(A) from the degree of impairment (which results from the disability condition) as determined by the American Medical Association "Guide to Impairment"; or

(B) by the percentage reduction (which results from the disability condition) in the physical capacity of the employee to engage in work of the nature in which the employee was engaged when exposed to a toxic substance or disease.

(2) In considering the percentage reduction in physical capacity, the following factor shall be taken into account: occupation at onset of the disability, functional limitations resulting from the disability, age and predisability earnings.

(3) In cases for which it is determined that the degree of impairment or percentage reduction in physical ability is 50 percent or greater, the impairment or disability shall be considered permanent and total and compensation shall be awarded pursuant to subsection (b) of this section.

(4) Monetary benefits for partial disability shall in no event exceed the amount of monetary benefits which would

be paid to the disabled employee if such employee were totally disabled.

(5) Monetary benefits payable for partial disability shall be paid from the date of the onset of the disabling condition, and shall continue to be paid for the duration of such disabling condition, subject to the provisions of this subsection and subsection (g) of this section.

(6) Any claimant or the Secretary may apply to have monetary benefits previously awarded pursuant to this subsection redetermined based upon a change in the degree of impairment or percentage reduction of the physical capacity of the disabled employee to engage in work of the nature which the employee was engaged in when exposed to a toxic substance. Such redeterminations may be requested no more frequently than once each twelve months. Such application shall be made and determined in accordance with the provisions of subsections (b) through (e) of section 8 of this Act.

(e) MEDICAL BENEFITS.—Medical benefits associated with the death or disability of any employee shall be provided under this Act for all reasonable and necessary medical, hospital, surgical, diagnostic, and associated expenses, including the expense of drugs or treatments or nursing care (whether provided in a home or medical facility) required for treatment.

(f) BENEFITS FOR DEATH OR DISABILITY OF DEPENDENTS.—Benefits for dependents shall be calculated on the basis of the greater of 66⅔ percent of the dependent's average weekly wage (subject to a maximum of 200 percent of the national average weekly wage) for the month in which the disability or death occurred or 80 percent of the national average manufacturing weekly wage or national average construction weekly wage (as applicable) or, in the case of partial disability or impairment pursuant to subsection (d), the appropriate percentage of such benefits as described therein.

(g) ANNUAL ADJUSTMENTS.—Monetary benefits payable for death, total disability, and partial disability shall be adjusted annually to reflect increases in the national manufacturing average weekly wage or the national construction average weekly wage, whichever is the basis for such benefits, except that no such adjustment shall exceed 6 percent.

(h) OFFSET FOR OTHER BENEFITS.—Any monetary benefits for death or disability under this Act shall be reduced by the amount of any monetary benefit received by the claimant at the same time under a State worker's compensation law or under the Longshore Act for a similar claim.

(i) PROHIBITION OF LIMITATIONS ON RIGHTS TO BENEFITS.—(1) Except as otherwise provided in this Act, there shall be no maximum limitation on the total amount or duration of monetary benefits payable in the case of death or disability under this Act.

(2) There shall be no maximum limitation on the total amount or duration, or on the type or extent of medical benefits under this Act.

(3) No compromise or release of any monetary benefits under this Act with respect to any death or disability shall be effective unless approved by the Secretary, based on a determination that such compromise or release is the best interest of the claimant.

(4) No compromise or release of medical benefits under this Act with respect to any death or disability shall be effective unless approved by the Secretary, based on a determination that the compromise and release will sufficiently provide for the future medical care necessitated by the employee's disease, and a determination by the Secretary that such compromise and release is otherwise in the best interest of the employee.

(5) No waiver, release, or similar instrument relating to future coverage or compensation under any State worker's compensation law or under this Act that is executed prior to the death or onset of disability resulting from any exposure to a toxic substance shall be effective under any circumstances.

SEC. 6. ELIGIBILITY FOR COMPENSATION.

(a) In General.—A claimant shall be eligible for compensation under this Act upon a determination—

(1) that the employee was exposed to a toxic substance in the course of employment; and

(2)(A)(i) that the employee or dependent is or was disabled by a disease associated with exposure to a toxic substance or process, and (ii) that the disease arose out of and in the course of the employee's employment; or

(B)(i) that the employee's or dependent's death was caused by a disease associated with exposure to a toxic substance or process, and (ii) that the disease arose out of and in the course of the employee's employment.

(b) PROOF OF CONTRIBUTION OR AGGRAVATION.—For purposes of subsection (a)(2), a claimant shall be eligible for compensation pursuant to this Act upon a determination that the employee's exposure to a toxic substance in the course of employment significantly contributed to or aggravated the disabling disease or significantly contributed to the death.

(c) PRESUMPTIONS.—The following shall apply with respect to claims based on exposures to asbestos:

(1) Mesothelioma of the pleura or peritoneum shall be conclusively presumed to have resulted from exposure to asbetos.

(2) Asbestosis shall be conclusively presumed to have resulted from exposure to asbestos.

(3) Cancer of the lung shall be conclusively presumed to have resulted from exposure to asbestos in a case in which either radiological or histological evidence is produced of asbestotic changes to the lung or pleura, or in the absence of radiological or histological evidence, if the claimant can establish the duration of occupational exposure in a work population as specified in paragraph (4). In the absence of radiological or histological evidence and a duration of occupational exposure less than specified in paragraph (4), there shall be only a presumption that cancer of the lung resulted from exposure to asbestos.

(4) For purposes of paragraph (3), the duration of occupational exposure to asbestos in a work population specified in this paragraph is as follows:

(A) Insulation worker: one year or greater.

(B) Shipyard worker: two years or greater.

(C) Chemical plant worker: five years or greater.

(D) Other worker: twenty years or greater.

(5) Cancers other than those described in paragraphs (1) and (3) shall be conclusively presumed to have resulted from exposure to asbestos when the claimant can establish occupational exposure in a work population as follows:

	Cancer		
	Stomach Colon Rectum	Kidney	Larynx
Insulation worker	5 yrs.	2.5 yrs.	3 yrs.
Shipyard worker	10 yrs.	5 yrs.	5 yrs.
Chemical plant worker	25 yrs.	12.5 yrs.	15 yrs.

(6) The presumptions contained in this section shall not be available with respect to a claim for compensation due to death or disability from a cancer which occurred less than ten years after the employee or dependent was first exposed to asbestos in the course of employment.

(d) Availability to Dependents.—The provisions of subsection (c) shall apply to dependents' claims.

SEC. 7. PROCEDURE FOR MAKING CLAIMS.

(a) Place and Time for Filing.—A claim for compensation for disability or death shall be filed by a claimant with the Office of Workers' Compensation Programs in the district in which the claimant resides or the district in which the claimant worked. Except as provided in subsection (b), such claim for compensation shall be filed within three years after the onset of the disability or within three years of the death.

(b) Exceptions.—(1) A claim based on exposure to asbestos may be filed within two years after the effective date of this Act with respect to a death which occurred prior to such effective date or with respect to a disability the onset of which occurred prior to such effective date.

(2) A claim based on exposure to a toxic substance designated pursuant to section 15 may be filed within three years after the effective date of such designation with respect to a death which occurred prior to such effective date or with respect to a disability the onset of which occurred prior to such effective date.

(3) The time for filing a claim shall not begin to run in any event until the employee is disabled or has died, and the employee or the claimant is aware, or through the exercise of reasonable diligence should have been aware, of the causal relationship between the workplace exposure to a toxic substance and the disability or death.

(4) When a claimant has filed a claim for compensation in a timely fashion pursuant to this subsection, and the case is one in which the disability is not compensable under this Act at that time, a claim for compensation for disability pursuant to this subsection shall be timely if filed within two years after the occurrence of a compensable disability.

(c) IMPLIED LIMITATIONS BARRED.—There is no limitation on the filing of a claim for compensation due to disability or death under this Act based on the length of time since the employee was last employed, or last exposed to toxic substance, or due to the duration or intensity of such exposure.

SEC. 8. PROCEDURE FOR ADJUDICATION OF CLAIMS.

(a) DATE OF FILING.—A claim for compensation shall be deemed to be filed when the claimant has filed, with the Office of Workers' Compensation Programs, a claim for compensation on a form approved by the Secretary.

(b) PROCESSING OF CLAIM.—Upon receipt of a claim for compensation filed pursuant to section 7, the Office of Workers' Compensation Programs shall establish a claim file, assign a designating number to that file, and notify the claimant and the Fund of the file number within thirty days. The Office of Workers' Compensation Programs shall, at the same time, inform the claimant of whatever additional information, if any, the claimant must provide in order to permit the evaluation of the claim for compensation.

(c) INVESTIGATION AND EVALUATION OF CLAIMS.—(1) The Office of Workers' Compensation Programs shall make or cause to be made such investigation as is considered necessary with respect to the claim for compensation to determine whether the death or disability of the employee arose out of and in the course of employment due to exposure to toxic substance. The employer and the Fund shall provide such information as the Office of Workers' Compensation Programs may request and such other information as the employer and the Fund may consider relevant to the adjudication of the claim in a timely fashion.

(2) If, in connection with any claim for compensation, there exists a question as to whether the death or disabling condition of the employee or dependent was the result in whole or in part of a disease associated with exposure to a toxic substance, or if there exists a question as to the degree of reduction of the physical capacity of the employee or dependent, the Office of Workers' Compensation Programs, upon its own motion, or upon the motion of the claimant may submit such question for determination by a panel of full-time, career, and civil service physicians and other personnel assigned by the Surgeon General of the United States to the Secretary for this purpose. When such a question has been submitted to such panel, the panel shall review the medical and other evidence in the file, and may conduct a physical examination of the employee or dependent, and shall within 60 days, issue a written report of findings and conclusions. The report of the panel shall be dispositive of the questions submitted to the panel, except if a claimant adversely affected by such findings and conclusions demonstrates that the findings and conclusions of the panel are erroneous in a hearing as provided for in subparagraph (3).

(3) Upon review of the information from its investigation and the report of the medical panel provided for in subpara-

graph (2), the Office of Workers' Compensation Programs shall promptly issue an order awarding or denying compensation. Upon application of the claimant, the Office of Workers' Compensation Programs shall order a hearing on the claim for compensation. If a hearing on such a claim is ordered, the hearing shall commence no later than sixty days after such hearing is requested. Such hearing shall be conducted by an administrative law judge who shall give the claimant and the Office of Workers' Compensation Programs at least two weeks' notice of such hearing (served personally or sent by certified mail), and shall, within thirty days after the conclusion of such hearing, issue a decision on the matter. Upon receipt of such decision, the Office of Workers' Compensation Programs shall issue an order awarding or denying compensation in accordance with such decision, and shall send a copy of such order by registered mail to the claimant and the Fund.

(c) HEARING PROCEDURES.—Any hearing held under this section shall be conducted in accordance with the provisions of section 554 of title 5, United States Code. Such administrative law judge shall have all powers, duties, and responsibilities vested in hearing officers under the Longshore Act.

(d) DISABILITY AWARDS AFTER DEATH OF CLAIMANT.—An award of compensation for disability may be made after the death of the disabled employee or dependent.

(e) REFERRAL OF CLAIMS TO ANOTHER DISTRICT.—At any time after a claim for compensation has been filed with the Office of Workers' Compensation Programs, such claim may be transferred to another district of the Office of Workers' Compensation Programs for the purpose of making an investigation, taking testimony, making physical examinations, and taking such other necessary action thereon as may expedite the adjudication of the claim.

SEC. 9. APPEALS.

(a) FINALITY OF COMPENSATION ORDERS.—A compensation order is effective on the date on which it is issued by the Office of Workers' Compensation Programs pursuant to section 8(b)(3). Unless proceedings for review of such order have been instituted pursuant to subsection (b) of this section, such order shall become final at the expiration of the thirtieth day thereafter.

(b) PETITIONS FOR REVIEW.—The claimant or the Secretary may file a petition for review of such order or award with the Board.

(c) EVIDENCE STANDARDS.—(1) In review proceedings under this section, the decision of the Board shall be based upon the evidence in the record before the Office of Workers' Compensation Programs or the administrative law judge.

(2) The findings of fact by the Office of Workers' Compensation Programs shall be conclusive if supported by substantial evidence on the record as a whole.

(d) REVIEW UNDER LONGSHORE ACT PROCEDURES.—Subject to subsection (c), any final order of the Board shall be enforceable and reviewable in accordance with section 21 of the Longshore Act.

SEC. 10. EXCLUSIVE FEDERAL OCCUPATIONAL DISEASE WORKERS COMPENSATION INSURANCE FUND.

(a) ESTABLISHMENT OF FUND.—There is hereby created and established a Fund to be known as the "Exclusive Federal Occupational Disease Workers Compensation Insurance Fund", to be administered by the Secretary, for the purpose of insuring all employers and toxic substance market participants against liability for occupational disease and death resulting from occupational disease sustained by employees compensable under this Act and for the purpose of providing compensation and benefits to employees and their dependents.

(b) RESPONSIBILITY OF FUND.—(1) The Fund established pursuant to subsection (a) shall be responsible for the payment of all compensation with respect to claims under this Act.

(2) An employer or participant shall not be entitled to the limitations on liability provided in section 4 with respect to any action instituted at any time after the effective date of this Act unless such employer or participant is insured by the Fund. An employer is insured by the Fund if—

(A) the employer or participant has entered into an agreement with the Secretary in accordance with subsection (c); and

(B) such agreement has not been suspended by the Secretary pursuant to subsection (e).

(c) PARTICIPATION IN INSURANCE.—(1) The Secretary shall determine which employers and toxic substance market participants with respect to each toxic substance shall be required to become insured by the Fund, and shall notify all such employers and participants of such determination by individual or general notice. Such a determination shall not be subject to review except in an action for review under subsection (e) or (f).

(2) In addition, any other employer or toxic substance market participant may petition the Secretary for authority to participate in the Fund, and upon approval of the Secretary, may participate in the Fund.

(d) ESTABLISHMENT OF PREMIUMS.—(1) No later than September 1 of each year, the Secretary shall determine the aggregate amount of insurance which must be maintained by the Fund for the following year (A) for the payment of claims for which the Secretary anticipates the Fund will be responsible during such year, and (B) for the payment of the administrative costs allocable to the Fund in accordance with subsection (h) for such year. In making the determination required by clause (A), the Secretary shall consider the past experience of the Fund, anticipated obligations of the Fund in such year, appropriate actuarial projections, and other appropriate data.

(2) Not later than fifteen days after making a determination under paragraph (1) of the aggregate amount of coverage which must be maintained, the Secretary shall inform employers and toxic substance market participants of the amount of insurance premiums which they shall be obligated to provide to the Fund in accordance with the allocation formulas established by the Secretary pursuant to paragraph (3).

(3)(A) The Secretary shall by regulation determine the proportion of insurance premiums to be provided respectively by employers which expose workers to toxic substances and the proportion to be provided by toxic substance market participants, based on a determination of the relative payments made by employers as workers' compensation payments to affected workers during a representative period prior to the effective date of the coverage of such toxic substance or industrial process under this Act, and other appropriate factors.

In making such determination, the Secretary shall also consider the occupational health and safety inspection records of an employer in regard to exposures to such toxic substances or processes for which a compensation standard has been established, making appropriate reductions in the employers' contribution to the Fund, in order to further the objective encouraging the safe use of toxic substances or the reduction of the use of harmful industrial processes by employers, and encouraging the development by toxic substance market participants of safer alternative substances which could be accomplished by assigning the relative responsibility for providing insurance coverage for the compensation of workers under this Act to employers and toxic substance market participants.

(B) The Secretary shall distribute, among toxic substance market participants, the obligation to provide the proportion of insurance premiums assigned to such toxic substance market participants pursuant to subparagraph (A) on the basis of a formula, which the Secretary shall by regulation prescribe, that allocates such obligation among toxic substance market participants on the basis of—

(i) relative market shares of a toxic substance or of products containing a toxic substance during appropriate representative periods;

(ii) relative toxic substance content of the participant's product or products;

(iii) the relative risk which the toxic substance contained in the participant's product or products poses to workers;

(iv) experience in litigation with respect to liabilities which are limited by section 10; and

(v) such other factors as the Secretary determines appropriate.

(C) The Secretary shall distribute, among employers which expose workers to toxic substances in the course of employment, the obligation to provide the proportion of insurance premiums assigned to such employers pursuant to subparagraph (A) on the basis of a formula, which the Secretary shall by regulation prescribe, that allocates such obligation among such employees. Such formula shall take into account—

(i) the relative toxic substance content and the relative risk posed by material in use in such employers' workplaces;

(ii) the numbers of employees exposed and the duration of such exposure;

(iii) the relative intensity of employee exposure;

(iv) the workers' compensation claims experience of such categories and sizes of employers; and

(v) such other factors as the Secretary determines to be appropriate.

(e) SUSPENSION OF PARTICIPATION AGREEMENT.—(1) The Secretary shall suspend the agreement entered into under subsection (c) of an employer or toxic substance market participant—

(A) for failure to obtain and maintain insurance from the Fund;

(B) for failure to pay the applicable premium under subsection (d)(3)(C); or

(C) for substantial failure to comply with any other provision of this Act or of any regulation promulgated under this Act.

(2) The Secretary shall not suspend any such agreement except after fifteen days' written notice to the participant or employer and opportunity for a hearing at which the participant or employer shall be entitled to be heard in person or by counsel and to present evidence.

(3) The Secretary may terminate a suspension upon presentation of adequate proof that the basis for the suspension has been eliminated, but such termination shall not affect actions instituted during the suspension.

(f) ACTIONS TO COMPEL INSURANCE COVERAGE.—(1) If an employer or toxic substance market participant fails or refuses to obtain and maintain insurance from the Fund sufficient to meet its obligations to the Fund under this section within thirty days after notification thereof, or fails or refuses to pay the applicable premium under subsection (d)(3)(C) within thirty days, the Secretary is authorized to bring a civil action in the appropriate United States district court to require such insurance or to require the employer to pay such surcharge or premium.

(2) Any employer or toxic substance market participant which fails or refuses to obtain and maintain insurance from the Fund sufficient to meet its obligations to the Fund under this section, or who fails or refuses to pay the applicable surcharge or premium under subsection (d)(3)(C), may be assessed a civil penalty by the Secretary in such amount as the Secretary may prescribe, but not in excess of an amount equal to 50 percent of the amount of such obligation, surcharge, or premium. Such penalty shall be in addition to any other liability of the participant or employer under this Act. Penalties assessed under this paragraph may be recovered in a civil action brought by the Secretary and penalties so recovered shall be deposited in the Treasury of the United States.

(3)(A) Any person who, on or after January 1, 1940, has acquired or acquires any toxic substance market participant, or substantially all the assets of any such participant, from a corporation, partnership, individual, joint enterprise, or any other entity which was the operator of such participant or the owner of such assets on or after January 1, 1940, shall be liable for and shall be insured by the Fund in the same manner and in the same amount as would have been payable by the prior operator of the business involved with respect to operations of such prior operator.

(B)(i) A toxic substance market participant shall be liable for the total amount of the liability for contributions under this Act without regard to whether such participant is or has been a debtor in a case commenced under title 11, United States Code, and without regard to whether any plan, discharge, or judgment is or has been confirmed, granted, or entered in such case.

(ii) If a toxic substance market participant has ceased to exist or ceases to exist by reason of a reorganization which involves a mere change in identity, form, or place of organization, however effected, a successor corporation or other corporate or business entity resulting from such reorganization shall be treated as the participant to which this section applies.

(iii) If a toxic substance market participant has ceased to exist or ceases to exist by reason of a liquidation into a parent corporation, the parent corporation shall be treated as the toxic substance market participant to which this section applies.

(iv) If a toxic substance market participant has ceased to exist or ceases to exist by reason of a merger, consolidation, or division, the successor corporation or business entity shall be treated as the toxic substance market participant to which this section applies.

(g) ADMINISTRATIVE COSTS COVERED BY FUND.—The Fund shall be responsible for the payment of an annual fee to the Secretary in an amount determined by the Secretary to represent the Federal administrative costs of operations necessary to establish and maintain the compensation and benefit system established under this Act. Such fee shall not exceed the sum of—

(1) an amount equal to 10 percent of the aggregate amount of coverage for payment of claims for the year as determined under subsection (c)(1)(A), which shall be used by the Secretary, subject to the availability of appropriations, to pay the costs incurred by the Office of Workers' Compensation Programs, the Division of Administrative Law Judges, and the Board in connection with claims filed pursuant to this Act, except that if in any year the amounts provided under this paragraph exceed the actual costs of program administration, the Secretary shall reduce the amount for the following year correspondingly; and

(2) an amount equal to 1 percent of the aggregate amount of coverage for payment of claims for the year as determined under subsection (c)(1)(A) which shall be used, subject to the availability of appropriations, for surveillance and medical treatment research of occupationally related diseases pursuant to the provisions of section 15 of this Act.

SEC. 11. PAYMENT OF COMPENSATION.

(a) FREQUENCY AND DURATION OF PAYMENTS.—Compensation under this Act shall be paid biweekly. Such compensation shall be paid promptly and directly to the person entitled thereto upon the issuance of a final compensation order pursuant to section 8 or 9 of this Act and shall continue to be paid during the pendency of any judicial review of such a final compensation order.

(b) INFORMATION CONCERNING PAYMENTS.—(1) Upon making the first payment of compensation, the Fund shall notify the Office of Workers' Compensation Programs of the commencement of the payment of compensation and the amount of compensation to be paid.

(2) Upon suspension of payment in any case, the Fund shall immediately notify the claimant and the Office of Workers' Compensation Programs of such suspension, and the reason therefor.

(3) Annually, within thirty days after the anniversary date of the effective date of this Act, the Fund shall file with the Office of Workers' Compensation Programs a report detailing the total amount of compensation and medical benefits paid in connection with claims under this Act during that year.

(c) SUSPENSION OF PAYMENTS.—(1) When the payment of compensation has been suspended, the Office of Workers' Compensation Programs shall conduct an investigation of the case and the reasons for suspension of the payments. If the Office of Workers' Compensation Programs finds that such payments were improperly suspended, it shall order the Fund to commence payment of the compensation, and all suspended payments shall be paid to the person entitled thereto, with interest at a rate equal to 20 percent per year of the amount so order to be paid.

(2) Any person who is aggrieved by an order of the Office of Workers' Compensation Programs with respect to suspended payments may appeal from such order to the Board in accordance with the procedures in section 9 of this Act. Orders issued pursuant to this section shall be enforceable in accordance with section 21 of the Longshore Act.

(d) PENALTY FOR LATE PAYMENT.—If any compensation payable under the terms of an award or order of compensation pursuant to this Act is not paid within twenty-one days after such award or order shall become final, or if any installment of compensation is not paid within twenty-one days after such award or order shall become final, or if any installment of compensation is not paid within fourteen days of the date on which such compensation is due, there shall be added to such compensation or compensation payment, an amount equal to 20 percent thereof, which shall be paid to the person entitled to, the compensation payment, unless review of the compensation award or order is pending pursuant to section 9 of this Act, and an order staying such payment has been issued by the Board or the court.

SEC. 12. REPRESENTATION FEES.

(a) DETERMINATION OF FEES.—If the claimant shall have utilized the services of a representative in the successful prosecution of such claim, the Office of Workers' Compensation Programs, the Board, or court, as shall be appropriate, shall determine a reasonable representation fee in connection with such representation of the claimant in such matter taking into account the responsibility assumed by the representative, the complexity of the case, the care exercised in developing the case, the time involved, and the results obtained.

(b) PAYMENT OF FEES.—Such representation fee shall be paid to the representative in one lump sum, directly, by the Fund, within two months after the order of compensation shall become final and shall be in addition to any such compensation.

(c) WITNESS EXPENSES.—(1) In cases where a representation fee is awarded pursuant to subsection (a) of this section, there shall also be assessed an additional amount for the payment of costs, fees, and mileage for necessary witnesses attending the hearing at the instance of the claimant. Both the necessity of the witnesses and the reasonableness of the fees of expert witnesses must be approved by the Office of Workers' Compensation Programs, administrative law judge, Board, or court, as the case may be.

(2) The amount assessed for such costs and fees shall also be paid to the claimant's representative, directly by the Fund, in one lump sum, for disbursement by that representative to the witnesses, or as may be required,

(d) PENALTIES.—Any person (1) who receives any fees or other consideration, or any gratuity, on account of services rendered as a representative of a claimant, unless such consideration or gratuity is approved by the Office of Workers' Compensation Programs, Board, or court, or (2) who solicits employment for an attorney at law or for himself or herself in respect to any claim or award of compensation, shall upon conviction thereof, for each offense be punished by a fine of not more than $1,000 or by imprisonment for not more than one year, or by both such fine and imprisonment.

SEC. 13. EMPLOYMENT OR COVERAGE DISCRIMINATION.

(a) DISCRIMINATION PROHIBITED.—No toxic substance market participant or other employer, insurance carrier, or other person shall discharge or in any manner discriminate against any employee because such employee—

(1) has filed a claim for compensation under this Act;

(2) instituted or caused to be instituted any proceeding under or related to this Act, or has brought any suit at law for damages resulting from occupational exposure to a toxic substance;

(3) is disabled by such exposure;

(4) was previously employed with a toxic substance market participant; or

(5) was exposed or may have been exposed to a toxic substance.

Any toxic substance market participant or other employment, insurance carrier, or other person who violates this section shall be liable to a civil penalty of not less than $100 or more than $1,000 for each such violation, as may be determined by the Secretary. Any such penalty may be recovered in a civil action brought by the Secretary in the appropriate United States district court.

(b) REVIEW OF ALLEGED DISCRIMINATION.—Any employee who believes that he or she has been discharged or otherwise discriminated against by any employer in violation of subsection (a) may, within three months after such violation occurs, apply to the Secretary for a review of such alleged discharge or discrimination. A copy of the application shall be sent to the person alleged to have taken the action, who shall be the respondent. Upon receipt of such application, the Secretary shall cause such investigation to be made as the Secretary deems appropriate. Such investigation shall provide an opportunity for a public hearing before an administrative law judge at the request of any party to enable the parties to present information relating to such violation. The administrative law judge shall give the parties written notice of the time and place of the hearing at least two weeks prior to the hearing. Any such hearing shall be subject to section 554 of title 5, United States Code. Upon receiving the report of such investigation, the Secretary shall make findings of fact. If the Secretary finds that there was no such violation, the Secretary shall issue an order denying the application. Such an order shall incorporate the Secretary's findings therein.

(c) REINSTATEMENT WITH BACK PAY AND BENEFITS.—Any employee so discriminated against shall be restored to his or her employment and shall be compensated by the employer for any loss of wages (including fringe benefits) arising out of such discrimination. The employer alone and not the carrier shall be liable for such penalties and payments. Any provision in an insurance policy undertaking to relieve the employer from liability for such penalties and payments shall be void.

(d) NONDISCRIMINATION IN INSURANCE COVERAGE.—No provider or insurer of health care coverage shall exclude from coverage any worker or family member on the basis of that person's inclusion in a population at risk.

SEC. 14. SURVEILLANCE AND MEDICAL TREATMENT RESEARCH.

(a) RESEARCH BY DEPARTMENT OF HEALTH AND HUMAN SERVICES.—The Secretary of Health and Human Services, in coordination with the Secretary, shall conduct research into improving the means of surveillance of workers exposed to occupational health hazards, and research into improved means of medical treatment of workers exposed to occupational hazards. Such research shall include, but not be limited to, the following areas—

(1) studying the etiology and development of occupationally related diseases, and the development of disabilities resulting from such diseases;

(2) developing means of surveillance of workers exposed to occupational health hazards;

(3) examining the medical treatment of workers exposed to occupational health hazards, and means of medical intervention to prevent the deterioration of the

health and functional capacity of workers disabled by occupational diseases;

(4) studying and developing medical treatment of workers exposed to occupational health hazards;

(5) developing educational programs designed to train workers on measures which they may take to ameliorate the effects of those diseases; and

(6) developing and implementing methods to enhance surveillance programs, and development of effective notification and self-administration of claims programs.

(b) FUNDING OF RESEARCH.—All research undertaken pursuant to this section shall be conducted with funds available under section 11(h)(2) of this Act.

(c) USE OF EXPERTS AND CONSULTANTS.—In carrying out research under this section, the Secretary of Health and Human Services shall be authorized to engage the services of experts and consultants, as he or she deems necessary.

SEC. 15. ADDITIONAL COVERAGE OF OCCUPATIONAL DISEASES.

(a) DESIGNATIONS OF ADDITIONAL SUBSTANCES AND VICTIMS.—In accordance with the procedures required by this section, the Secretary shall promulgate and revise as may be appropriate, regulations providing that this Act may provide compensation to workers who suffer death or disability due to occupational exposure to toxic substances in addition to asbestos, or may provide compensation to specific categories or groups of workers who suffer death or disability due to occupational exposure to such a toxic substance.

(b) RISK ASSESSMENT PANEL.—(1) There is hereby established the Risk Assessment Panel which shall be located within the National Institute for Occupational Safety and Health. The Director of such Institute shall also serve as Chairman of the Panel. The Panel shall consist of four members in addition to the Chairman. Members shall serve full-time on the Panel and shall be career Public Health Service employees and designated by the Surgeon General of the United States to serve terms of five years. The Panel shall include an epidemiologist, toxicologist, industrial hygenist, and a physician. There shall be a full-time secretariat provided by National Institute for Occupational Safety and Health to serve the Panel.

(2) The Panel shall review the current medical and scientific studies and reports concerning the incidences of disease associated with employment, report to the Secretary of Health and Human Services on the state of the current research with respect to such diseases, and designate from this review populations or individuals at risk of disease associated with their work or from exposure to toxic substances, agents, and processes. In making its identification of populations or

individuals with a high added burden of risk of occupational disease the Panel shall consider the following factors based on the best available scientific evidence—

(A) evaluate and review studies where agents, processes, or jobs are found to have been toxic from (i) observations of human populations, or (ii) animal and laboratory research; and

(B) evaluate or initiate studies relating to estimates of significant risk of death or disease in specific areas or organ of the body (site specific) in the populations exposed to the agent, process, or job.

(3) If the Panel determines based on an evaluation of paragraph (2)(A) and (B) that a significant, elevated risk has been found in a population for workers who have (A) established membership in the population, (B) manifest disease, and (C) experienced sufficient exposure as defined in paragraph (7), it shall make a finding that such exposure to such toxic substance or process is compensable under this Act.

(4) The Panel shall include in the proposal eligibility criteria, including appropriate presumptions based on exposure and latency of the disease from the first exposure to establish the relationship between certain diseases and exposure to the toxic substance or process.

(5) Where the Panel finds that an exposure relationship is at least equivalent to that which has been found with

regard to asbestos and lung cancer for insulation workers, it shall constitute a conclusive presumption with respect to the relationship between the exposure and the disease.

(6) When information is insufficient because of the size of population or the absence of a population study to establish a significant elevated risk, clinical, histological data, in combination with experimental evidence establishing a potential risk to humans, may be used in conjunction with information on exposure to an agent or process to justify a conclusive presumption of such relationship until such time as a population study is completed.

(7) For purposes of this section, the Panel shall define "sufficient exposure" on the basis of the duration of exposure to a toxic substance or process which results in at least a 30 percent increase in the risk of developing a disease arising from such exposure. As a standard for measuring the added risk associated with the work environment, the criteria for a "sufficient exposure" shall be the equivalent of the criteria measuring a 30 percent increased risk of lung cancer in insulation workers compared to similar workers without exposure.

(8) The Panel shall undertake as its first priority the designation of populations exposed to agents or processes for which there already exists a permanent standard issued under section 6(b)(5) of the Occupational Safety and Health Act.

The Panel shall consider, act, and transmit to the Secretary their findings on these agents and processes within one year.

(c) Report to Secretary.—The Chairman of the Panel shall within 30 days after designation of the identified populations and individuals as determined in subsection (b) transmit such report to the Secretary.

(d) Publication for Comment.—Within 90 days of receipt of the report from the Panel, the Secretary shall publish for a comment period not to exceed 60 days as may be appropriate, a proposal to promulgate regulations providing for the inclusion of the additional toxic substance or processes within the coverage of the Act, consistent with the recommendation of the Panel.

(e) Panel Review.—Upon the conclusion of the comment period, the Secretary shall refer comments to the Panel for further consideration or reevaluation of its findings. The Panel shall furnish such additional findings as it may determine within 60 days to the Secretary. Such supplemental report shall specify in detail the reasons for the Panel's acceptance or refutation of significant comments and the basis for any changes in its previous recommendation. Consistent with the purposes it was designed to serve, the Panel's authority is limited to consideration of comments relative to the scientific determination such as the significance of site specific rates, sample size, dose/response relationship, pattern of exposure, contradictory commensurable data, and the quality of the empirical evidence. Economic, social, and political considerations shall not be considered by the Panel in its evaluation.

(f) FINAL REGULATION.—Within 30 days of the receipt of the revised report from the Panel, the Secretary shall publish in the Federal Register a final regulation with respect to coverage under this Act, which regulation shall be consistent with the recommendation of the Panel and which shall become effective upon publication.

SEC. 16. ADMINISTRATION BY OFFICE OF WORKERS' COMPENSATION PROGRAMS AND BENEFITS REVIEW BOARD.

(a) TASK FORCES REVIEW.—(1) The Director of the Office of Workers' Compensation Programs shall establish a separate task force within the Office of Workers' Compensation Programs for administering claims filed pursuant to this Act, and all additional personnel of the Office of Workers' Compensation Programs designated to process and administer claims filed under this Act shall be assigned to such task force. The Director shall insure that personnel assigned to the task force are located in each regional and area office of the Office of Workers' Compensation Programs. The Director shall establish procedures for the administration of such claims by such task force which shall be designed to facilitate the prompt determination of the eligibility of claimants pursuant to the provisions of this Act and to assure the effective determination and monitoring of claims.

(2) All claims for compensation filed under this Act shall be administered by such task force until the Director determines that the work of such task force can be integrated with the remainder of the Office of Workers' Compensation Programs in a fashion which will not detrimentally effect the administration of claims under this Act or the administration of claims under other compensation programs within the jurisdiction of the Office of Workers' Compensation Programs. Such a determination by the Director shall be based on a finding that—

(A) the procedures for handling claims under this Act will be no less effective as a result of such integrated administration; and

(B) any backlog of claims filed under this Act has been reduced to a level which is manageable by an integrated administration of all compensation programs within the jurisdiction of the Office of Workers' Compensation Program.

(b) Standards for Board Review.—The Benefits Review Board shall prescribe rules of procedure for its review of the orders of the Office of Workers' Compensation

Programs in cases under this Act which shall meet the following standards of review:

(1) Any person adversely affected or aggrieved by an order of the Office of Workers' Compensation Programs may file and serve a petition for discretionary review by the Board of such order within thirty days after the issuance of such order. Review by the Board shall not be a matter of right but of discretion of the Board.

(2) Petitions for discretionary review shall be filed only upon one or more of the following grounds:

(A) a finding or conclusion of material fact is not supported by substantial evidence;

(B) a necessary legal conclusion is erroneous;

(C) the decision is contrary to law or to the promulgated rules or decisions of the Board;

(D) a substantial question of law, policy, or discretion is involved; or

(E) a prejudicial error of procedure was committed.

(3) Each issue shall be separately numbered and plainly and concisely stated, and shall be supported by detailed citations to the record when assignments of error are based on the record, and by statutes, regulations, or principal authorities relied upon. Except for

good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge or the Office of Workers' Compensation Programs had not been afforded an opportunity to pass. Review by the Board shall be granted only by affirmative vote of a majority of the members present and voting. If granted, review shall be limited to the questions raised by the petition.

(4) At any time within thirty days after the issuance of an order by the Office of Workers' Compensation Programs, the Board may in its own discretion (by affirmative vote of a majority of the members present and voting) order the case before it for review but only upon the ground that the decision may be contrary to law or Board policy, or that a novel question of policy has been presented. The Board shall state in such order the specific issue of law, Board policy, or novel question of policy involved. If a party's petition for discretionary review has been granted, the Board shall not raise or consider additional issues in such review proceedings except in compliance with the requirements of this paragraph.

(5) For the purpose of review by the Board under paragraph (1) or (2) of this subsection, the record shall include—

(A) all matters constituting the record upon which the order of the Office of Workers' Compensation Programs was based, including any record before an administrative law judge;

(B) the rulings upon proposed findings and conclusions;

(C) the decision of the administrative law judge;

(D) the petition or petitions for discretionary review, responses thereto, and the Board's order for review; and

(E) briefs filed on review.

The Board either may remand the case to the Office of Workers' Compensation Programs for further proceedings as it may direct or it may affirm, set aside, or modify the order of the Office of Workers' Compensation Programs in conformity with the record. If the Board determines that further evidence is necessary on an issue of fact, it shall remand the case to the Office of Workers' Compensation Programs for further proceedings.

SEC. 17. ADMINISTRATIVE PROVISIONS FOR INSURANCE FUND.

(a) Authority to Contract Out.—In administering the Fund under this Act, the Secretary is authorized to enter into any contracts, agreements, or other appropriate arrangements which may, from time to time, be necessary for the purpose of establishing the Fund.

(b) FUNCTIONS PERMITTED TO BE CONTRACTED; TERMS.—(1) In order to provide for maximum efficiency in the administration of the Fund, the Secretary may enter into contracts with Fund or other private organization, for the purpose of securing performance by such Fund, or organization of any or all of the following responsibilities:

(A) estimating and later determining any amounts of payments to be made;

(B) receiving from the Secretary, disbursing, and accounting for funds in making such payments;

(C) making such audits of the records as may be necessary to assure that proper payments are made; and

(D) otherwise assisting in such manner as the contract may provide to further the purposes of this Act.

(2) Any contract with the Fund or other private organization under this section may contain such terms and conditions as the Secretary finds necessary or appropriate for carrying out responsibilities under paragraph (1) of this section, and may provide for payment of any costs which the Secre-

tary determines are incidental to carrying out such responsibilities which are covered by the contract.

(3) No contract may be entered into under this subsection unless the Secretary finds that the Fund, or organization will perform its obligations under the contract efficiently and effectively, and will meet such requirements as to financial responsibility, legal authority, and other matters as he finds pertinent.

(4)(A) Any such contract may require the Fund, or organization or any of its officers or employees certifying payments or disbursing funds pursuant to the contract, or otherwise participating in carrying out the contract, to give surety bond to the United States in such amount as the Secretary may deem appropriate.

(B) No individual designated pursuant to a contract under this section to certify payments shall, in the absence of gross negligence or intent to defraud the United States, be liable with respect to any payment certified by him under this section.

(C) No officer disbursing funds shall in the absence of gross negligence or intent to defraud the United States, be liable with respect to any payment by him under this section if it was based upon a voucher signed by an individual designated to certify payments as provided in subparagraph (B) of this paragraph.

(5) Any contract entered into under this section shall be for a term of one year, and may be made automatically renewable from term to term in the absence of notice by either party of an intention to terminate at the end of the current term; except that the Secretary may terminate any such contract at any time (after reasonable notice to the Fund, or organization involved) if he finds that the Fund, or organization has failed substantially to carry out the contract, or is carrying out the contract in a manner inconsistent with the efficient and effective administration of the Fund.

(c) ACCESS TO CONTRACTOR RECORDS.—(1) The Fund or other private organization executing any contract, agreement, or other appropriate arrangement with the Secretary shall keep such records as the Secretary shall prescribe, including records which fully disclose the total costs of the program undertaken or the services being rendered, and such other records as will facilitate an effective audit.

(2) The Secretary and the Comptroller General of the United States, or any of their duly authorized representatives, shall have access for the purpose of audit and examination to any books, documents, papers, and records of the Fund and any such insurance carrier or other private organization that are pertinent to the costs of the program undertaken or the services being rendered.

(d) CONTRACTING SUBJECT TO APPROPRIATIONS.—Any authority to enter into contracts, agreements, or other arrangements contained in this section shall be subject to the availability of appropriations for that purpose.

SEC. 18. ENFORCEMENT AUTHORITY.

Whenever it shall appear to the Secretary that any person is engaged or is about to engage in an act or practice constituting a violation of this Act or any rule or regulation under this Act, the Secretary may, in his or her discretion, bring an action in the proper district court of the United States to enjoin such acts or practices, and upon a proper showing an injunction or permanent or temporary restraining order shall be granted without bond.

SEC. 19. RECORDKEEPING.

The Secretary and the Risk Assessment Board shall devise and implement a Federal uniform recordkeeping system, including, where appropriate and useful, registries of populations and individuals exposed to toxic substances and processes. Employers shall be required to report on an annual basis such information as is required to carry out this program.

SEC. 20. EDUCATION GRANTS.

The Secretary shall implement directly and by grant to employer and employee groups education programs on the rights and obligations of employers and employees under this

Act. The Secretary shall support an Education Advisory Committee with equal representation by the Secretary, employers and employees to define guidelines and policy for such an education program. Grant applications shall be peer reviewed based on the system in place at the National Institutes of Health.

SEC. 21. SEPARABILITY.

If any provisions of this Act, or the application of such provisions to any person or circumstance, shall be held invalid, the remainder of this Act, or the application of such provisions to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby. The provisions of section 10 concerning third-party liability actions shall not, however, apply to any such third party if the provisions of this Act requiring such party to contribute to the payment of benefits to claims under this Act are held not to apply to such party; nor shall the provisions of section 10 affect the ability of any party to maintain an action against a third party if the provisions of this Act which provide for the compensation of death or disability are held not to apply to such party. If the provisions of section 10 establishing the exclusivity of the remedy of claimants are held to be unconstitutional, the obligation of toxic substance market participants to contribute to the payment of compensation under this Act shall cease.

SEC. 22. EFFECTIVE DATE.

Except as otherwise provided therein, the provisions of this Act shall become effective six months after the date of enactment of this Act.

○

Mr. MURPHY. The Subcommittee on Labor Standards will come to order, for the purpose of receiving testimony on asbestos compensation.

I would like to welcome the many people present here as the Subcommittee on Labor Standards begins addressing the problem of compensation for the hundreds of thousands of American workers who suffer from exposure to asbestos.

Today, the subcommittee begins a series of hearings on this very important subject. It is my earnest hope that all interested parties from the manufacturers of asbestos and their insurers, to exposed workers, and the U.S. Government can work harmoniously to create a fair, efficient, and equitable system of compensation. The major concern of this Congress must be to ensure fair and prompt compensation to those disabled because of asbestos exposure.

Today the subcommittee hears from three witnesses, each representative of important interests in the asbestos compensation problem.

Recently, the U.S. Court of Appeals for the Fifth Circuit, in a case involving the corporation of one of today's witnesses, stated that "A desperate need exists for Federal legislation in the field of asbestos litigation."

Without detailing the problems entailed in occupational exposure to asbestos, which today's witnesses will address, I only wish to reiterate that a "desperate need" does exist in this field as the Subcommittee on Labor Standards embarks on finding a solution to this very pressing problem.

I want to thank the witnesses and first call upon Mr. Jay Power, the legislative representative of the AFL-CIO, accompanied by Mr. David Mallino and Mr. Donald Elisburg.

STATEMENTS OF JAY POWER, LEGISLATIVE-REPRESENTATIVE, AFL-CIO; AND DAVID MALLINO, DEPUTY LEGISLATIVE DIRECTOR, INDUSTRIAL UNION DEPARTMENT, AFL-CIO; AND DON ELISBURG, ESQ., CONNERTON & BERNSTEIN

Mr. POWER. Thank you, Mr. Chairman.

Again, my name is Jay Power, legislative representative of AFL-CIO. I am accompanied today, on my left by Mr. David Mallino, who is the deputy legislative director of the Industrial Union Department, AFL-CIO, and on my right by Mr. Don Elisburg, who is an attorney with the firm of Connerton & Bernstein, who works with our building trades unions and our industrial unions on a number of matters.

I might say, Mr. Chairman, before I begin my testimony, there has been a great deal of unanimity within the family of labor on this issue, represented here today by David and Don, and I hope when the question and answer period comes that each member of our panel will respond to any questions you have.

I say that not only to include them because of their efforts, but also to dodge any tough questions that might come my way with two other people here.

Mr. Chairman, the AFL-CIO is pleased to be here today to present our views on occupational disease and the need for a Federal program to compensate workers and their families for death or disability resulting from work-related exposure to dangerous substances.

This subcommittee is embarking on an investigation that is vital to the well-being of millions of working men and women in this country, an investigation that will help define the type of concern and assistance that our Nation offers to those in need, an investigation that should demonstrate our overriding commitment to justice, and an investigation that must lead to an adequate, workable system to alleviate the deficiencies in our current scheme of workers' compensation and relieve the suffering of the evergrowing number of victims of occupational disease.

As we have said on previous occasions before this subcommittee and in our testimony last year to the Labor Subcommittee of the Senate Labor and Human Resources Committee, the moral and ethical issues raised by occupational diseases are so serious that common sense tells all of us it is time to resolve this problem for the welfare of those who already have been stricken, for those who have been exposed and risk future disability, and for those who will be associated with toxic substances at tomorrow's job site.

Mr. Chairman, we appreciate this opportunity to offer your subcommittee our concerns about occupational disease and our suggestions for an appropriate course of action for the Federal Government.

All of the interested parties to this issue—millions of workers and their families, the manufacturers, employers, the insurance industry, the public-at-large, and the Congress of the United States—are and should be involved in a serious pursuit of the solutions to the pressing social, economic, legal, and political problems that occupational disease causes our society.

Workplace exposure to toxic substances has taken, and continues to take, a tremendous toll. Radiation, asbestos, cotton dust, kepone, vinyl chloride, benzidine, and a multitude of other agents have all been identified as workplace hazards.

An estimated 25 million workers are exposed to these and other harmful substances. Recent scientific reports show that one out of every four blue-collar workers will die from occupationally related cancers; 200,000 deaths will occur from asbestos alone by the end of this century; 25 percent of all smelter workers exposed to arsenic may die of occupational lung cancer; and 35,000 textile workers have been disabled by brown lung.

These estimates only reflect a few well-recognized hazards and do not even touch on such effects as nervous system disorders and reproductive harm, which are now being identified as other possible major health problems.

State workers' compensation systems, which were designed to deal with traumatic injury and not disease, have been woefully inadequate in providing compensation to the victims of occupational disease. Only a very small percentage of the most severely disabled by occupational disease receive benefits, and in the majority of cases only after litigation.

Over 90 percent of those workers who have occupational diseases classified as lung disorders and cancers are forced to litigate their claims before receiving compensation under State workers' compensation systems.

A Federal program is needed to furnish adequate and equitable compensation. Such a program should be comprehensive in scope, covering both known occupational health hazards and providing coverage through administrative action for additional hazards as they become known.

Such a program should include generous time limits for filing claims, taking into account the long latency periods for occupational diseases. And the program should include presumptive eligibility requirements reflecting the reality that many disabling diseases are caused by work-related exposure to a toxic substance.

As part of a comprehensive Federal response to the problems of occupational disease, companion legislation measures must also be adopted to identify, notify and diagnose workers who are at high risk as a result of an occupational health hazard.

The National Institute of Occupational Safety and Health, NIOSH, should be authorized to carry out medical research to isolate occupational diseases and to assist populations at risk.

We believe that H.R. 1309, the High Risk Occupational Disease Notification and Prevention Act of 1985, introduced on February 27 of this year by Congressman Gaydos and Chairman Hawkins of the Education and Labor Committee, represents a significant step forward in addressing this issue.

Occupational disease legislation, to be effective, must not only aid those who are, or will become, victims of toxic substance disease, but must provide a mechanism to prevent exposure to those substances found to cause these diseases.

Congressional action also is needed to correct the injustice of denying compensation to workers for job-related injury and disease on the ground of an alleged bankruptcy.

The AFL-CIO has long supported the traditional workers' compensation concept of exclusivity vis-a-vis the workers' employer. The certainty of the compensation payment, weighed against the uncertainty of traditional common law actions and defenses, has been the cornerstone of State workers' compensation systems for more than 70 years.

There are good reasons for this approach. Experience has shown that where workers have had to seek redress against their employers in the courts, the time consumed has been extensive, the outcome uncertain, and the awards, when they come, often net the worker very little after lawyer fees and costs. The employer also benefits by knowing the extent of his or her liability through the no-fault system.

The AFL-CIO would urge one exception from this approach. Companies should not have the shelter and protection of exclusive remedy when occupational illnesses related to toxic substances are the result of willful and intentional misconduct.

Any employer who knowingly and/or willfully exposes workers to dangerous substances or dangerous conditions, should forfeit any entitlement to an exemption from common law tort suits.

The severity of the occupational disease problem in the United States requires that every means of encouraging preventive action be employed, including the deterrent effect of possible legal action.

Similarly, the traditional third party worker rights against product manufacturers should not be eliminated by exclusive remedy formulas applicable to employer/employee compensation claims.

Potential manufacturer liability has proved to be a major incentive for high standards of testing and production as well as comprehensive notice of possible hazard. Removing product manufacturers from court liability will strip employees and their employers of much needed protection.

Workers and their employers must be entitled to their full rights against such manufacturers for additional damages including pain, suffering, loss of consortium and punitive damages as appropriate.

Mr. Chairman, my testimony summarizes the AFL-CIO's views on the pressing need for comprehensive legislation covering occupational diseases.

Attached to my testimony are more detailed statements prepared by the AFL-CIO's Building and Construction Trades Department and the Industrial Union Department. These two departments and the AFL-CIO are in full agreement on our proposed remedies for this growing national problem.

I would request that the statements of both the Building Trades and the Industrial Union Department be included in the text of my testimony.

I thank you for your time. We will be ready as a panel to address any questions you may have.

Mr. MURPHY. Thank you, Mr. Power. And without objection, we will accept into evidence and include into the testimony of today's hearing the attached statements that you have from Mr. Samuel and Mr. Georgine.

[The AFL-CIO statements follow:]

PREPARED STATEMENT OF HOWARD SAMUEL, PRESIDENT, INDUSTRIAL UNION DEPARTMENT, AFL-CIO

Mr. Chairman and members of the committee. On behalf of the Industrial Union Department, AFL-CIO, we are very pleased to be here to discuss some of the difficult problems workers face when they are exposed to toxic substances and processes. We also want to make clear that we support legislation to provide for realistic compensation for those who develop an occupational illness from exposure to these harmful substances.

As stated in the companion testimony of the AFL-CIO, occupational disease is a many faceted workplace problem. The focus of public attention has been on cancer and asbestos because of the enormous, well-publicized impact it has had on thousands of workers exposed to that substance. Nonetheless, rubber workers who develop leukemia from benzene, plastics workers who develop liver cancer because they must breathe vinyl chloride, miners who die of lung cancer because of ionizing radiation, electroplaters who breathe cadmium fumes and die of prostate cancer—all sicken and die just as easily as men and women exposed to asbestos.

Their suffering and the suffering inflicted upon their families should not be less because their tragedy draws less attention in the media.

Cancer is not our only occupational disease. Cotton dust disease, nerve destroyed by lead, mercury and solvents; all are worthy of our concern.

The problem of these diseases has been the focus of attention in hearings and proposed legislation before this committee on numerous occasions in the last 15 years. It was testimony relating to occupational disease, including testimony concerning asbestos and cotton dust exposure, that was a major impetus behind the enactment of the Occupational Safety and Health Act of 1970 (29 U.S.C. 660) (OSHA). The OSHA Act also created a National Commission on State Workermen's Compensation Laws to study the many problems then existing with state workers compensation programs.

The Commission reported in 1972. In several sessions of Congress following the report, this Committee considered legislation designed to provide a program of Federal Standards for State Workers compensation programs. During each of those hearings, representatives of organized labor have come before this Committee with overwhelming evidence of the seriousness of the occupational disease problem and the need for some kind of federally mandated program to provide adequate compensation to workers who fall victim to diseases after exposure to toxic substances. Thus far, legislation has not been enacted.

We believe that this Committee has sufficient informatioin before it from its prior investigations to recognize that the effects of toxic processes and substances on workers health must be the subject of a fair and equitable compensation scheme. A legislative solution must include coverage for those known toxic substances and processes for which populations of workers and bystanders for whom excessive rates of occupational disease have been identified; and, also include a mechanism for coverage of additional affected populations as they identified. It is important that the latter mechanisms be reasonably well-defined. Our experience with rule making for toxic substances and processes under other statutes, e.g. OSHA and Toxic Substances Control Act (TSCA) has shown that promulgation of effective standards is seriously hindered absent specific statutory Congressional direction.

A number of major considerations are involved. First, any legislative direction has to make clear the executive agency's responsibility to promulgate a suitable regulation in a specific time frame. Workers cannot become caught in the cross-fire of inter-agency disputes and suffer long delays in obtaining relief. For those populations already recognized outside of well documented occupational diseases such as asbestosis and cancer from exposure to asbestos, byssinosis among cotton textile workers, and benzidine-induced bladder cancer. the Congress should provide the necessary standards, or set a maximum time limit for coverage of diseases and workers under any legislation.

Second, in addition to specifying certain known diseases as qualifying for compensation, legislation should direct the executive agency to identify coverage of additional discrete occupational diseases and populations at risk of occupationally attributed disease which consider duration and intensity of exposure, specific diseases and specific areas or organs of the body to be covered, and the required medical determinations to be considered.

We believe that it will not be difficult for appropriate agencies such as NIOSH to make determinations for populations of workers exposed to toxic substances and processes that reflect the increased burden of risk of these workers developing occupational disease. Those who have borne this risk and developed cancer or other diseases because they are coke-oven workers, welders, textile workers, uranium miners, painters or oil refinery workers are no less entitled than workers with more well known occupational diseases to compensation.

Mr. Chairman, this is no wishful thinking about problems down the road. As is amply shown in my colleagues' testimony this morning, there are afflicted workers and their families who need help now. There are a number of high-risk populations which should be covered in legislation as passed, or certainly included within a short period of time after passage of any bill.

II

Let me now turn to a more specific explanation of the mechanism for including a particular toxic substance or process in a compensation scheme.

The existing state workers' compensation systems have failed to fairly compensate, usually to compensate at all, victims of occupational disease. It is important to know why this is the case.

One reason the compensation system has failed is because two fundamental concepts essential to understanding disease have not been adequately reflected in law.

The first concept is that disease cannot be explained in terms of simple, single causes and simple, single effects. The causes of disease are many and complex. So are the associated effects. Because most of us have this simplistic idea in mind when we use the term "cause," there is a growing consensus among scientists that the term should no longer be used either in scientific or lay publications. They suggest the term "risk factor" instead.

The second concept has been called "population thinking." This is a way of understanding each of us by looking at populations, that is groups to which we each belong because of some shared characteristic (such as our job exposure to a toxic substance). This kind of thinking has shaped the information we have received from the scientists in modern times. Statistical methods have become very important in gathering and analyzing the information as it comes to us, but few laws or proposed laws have been written with this reality in mind.

Whether we are struggling with the problems of causation or trying to understand what occurs in a population, we have to deal with information as the scientists gives to us. We must not ask that it be twisted to fit obsolescent language in our laws. Instead, we must change the law to fit the current state of science.

Compensation law has not been totally insensitive to these understandings. Thus, the terms "due to," "arose out of," "but for," and "the cause" usually found in compensation law should be retained only if they have been clearly qualified. One way this has been done traditionally is by the use of; "presumptions."

Used fairly and consistently, presumptions defined and utilized within a compensation system will reduce reliance on the tort system. They bridge the gap created by the uncertainty characteristic of scientific investigation and the ethical certainty that just claims, i.e., claims for disability and death more likely than not attributable to the workplace, must be paid.

For example, it is appropriate to create a presumption that asbestosis is caused by breathing asbestos because the typical scarring of the lung and calcification observed by the physician if found among significantly large numbers of exposed workers. The chance is very small that an excessive incidence or prevalence of the same conditions can be found in populations of workers in the absence of asbestos exposure.

A similar presumption is warranted for mesothelioma. Mesothelioma has in fact been associated with other fibers and, in animals, with some chemicals. But except for these rare circumstances, the cases studied have been associated with asbestos exposure at work or among the families of asbestos workers and other bystanders.

In the case of asbestosis and mesothelioma, a burden of risk of disease was added by the asbestos exposure for each and every worker in the population, even though the majority of those in the exposed population do not develop the disease. The size of the added burden varies, for example, with duration, extent and age at onset of the exposure, plus other environmental risk factors. Where the environmental factors are the same, the added burden of risk attributable to asbestos is the same and distributed uniformly throughout the entire group of workers. Other factors determine whether and when a worker actually becomes ill.

The principle of added burden of risk must be applied consistently. There are no special rules of nature that set mesothelioma, for example, apart from cancers found at other sites.

Among asbestos insulation workers, regardless of personal differences such as whether they smoked or not, the risk of lung cancer associated with the exposure was more than five times the risk of lung cancer found among workers not exposed to asbestos. The added burden of risk is the same for the entire exposed population—even though the entire population will not contract lung cancer—and, therefore a presumption is justified for those that do contract lung cancer.

The same case can be made for asbestos-exposed insulation workers who suffer from cancer at other sites (oropharynx, larynx, gastrointestinal tract, ovary, or kidney).

There are no special rules of nature reserved for the effects of asbestos. The principle of the added burden of risk applies to all of the toxic substances and processes and the analysis of the same.

A systematic way must be required to assess risk for all populations of workers, a generic approach to trigger all identified populations with a high risk of occupational disease.

We believe that the "trigger" has these elements:

1. An agent, process, or job found toxic from (a) observation of human populations or (b) animal and laboratory research.

2. Estimates of significant excess risk (30% or greater) of death or disease in specific areas or organs of the body (site specific) in the populations exposed to the agent, process or job.

3. Based on evaluations of (1) and (2), the appropriate agency makes a determination that a significant, elevated risk has been found in a population for workers who have (i) established membership in the population, (ii) have manifest disease, and (iii) experience sufficient exposure approximating that which results in a risk of disease in excess of 30% compared to similar workers without exposure and, that such exposure to such toxic substance or process is compensable under the legislated program.

The 30% benchmark is utilized for the imposition of the "trigger" because it is a level of risk for which the statistical data is available and widely accepted as reflecting an added burden of risk attributable in the workplace and therefore a burden of risk for which compensation should be paid.

III

We would like to make clear that our interest is not just in compensation alone. The basic process of risk assessment useful in a compensation scheme is also important and has application in the reduction of suffering and death.

One of the most important realities repeatedly established for environmentally induced chronic disease is the long period of latency between the onset of effective exposure and the first evidence of the disease. This "silent period" between initial exposure and the discovery of disease is of more than theoretical interest. It offers an opportunity, a possibility that intervention during this time might be successful in breaking the chain of events between exposure to an agent and the onset of uncontrollable disease. For cancer alone, the American Cancer Society estimates that nearly a third of the expected deaths could be prevented by existing clinical methods of early detection and treatment. There is even some evidence of reversing the development of disease before it is found when the exposure has been stopped. Consequently, an integrated program of early detection is an urgent need including the identification and notification of high-risk groups, resources for the diagnosis and verification of disease effects, community and family resources for continuous and lifetime surveillance, and referrral and counseling. In this regard, we commend the Committee's attention to H.R. 1309, the High Risk Occupational Disease Notification and Prevention Act of 1985 introduced on February 27, 1985 by Congressman Gaydos and Chairman Hawkins.

That bill provides the following steps for dealing with preventive intervention for workers at high risk:

1. Expands the federal research effort, coordinated by NIOSH, to identify and define worker populations at high risk of contracting environmental or occupational disease.
2. Authorizes NIOSH to establish a set of federal criteria for environmental health centers staffed and equipped for medically screening, monitoring, and counseling individuals in high risk populations. Such centers will be located and organized in existing community health care facilities, and provided with short-term professional staff education.
3. Creates a federal program to notify individuals within high risk populations that they are at risk because of an environmental exposure, and to refer them to environmental health centers that meet federally recommended criteria.
4. Requires private or public health insurance or other medical care programs to eliminate occupational exclusions in order to maintain existing benefits and entitlements covering examinations of high risk individuals who are notified by the federal government.
5. Establishes a strict set of worker and other individual protections against (1) employer discrimination on the basis of identification of being at high risk, and (2) abuse of genetic and other medical data.

We believe that these elements are essential to an effective program of occupational disease prevention. We cannot focus totally on compensation without bringing to bear understanding of this need as well.

Mr. Chairman, the Industrial Union Department joins the AFL-CIO and the Building Trades Department in underscoring the importance of enacting appropriate legislation at the earliest possible time. The evidence of the harm has been amply demonstrated in previous hearings before this and other Committees. There is no longer a question of Congress determining that we have a problem. The asbestos catastrophe alone demonstrates the need. The work before the Congress should be to develop and enact a workable solution. To that end we stand ready to assist this Committee in any way possible.

PREPARED STATEMENT OF ROBERT GEORGINE, PRESIDENT, BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO

Mr. Chairman and members of the committee. I am very pleased to join with my colleagues from the AFL-CIO and the Industrial Union Department to testify on behalf of the Building and Construction Trades Department. For many, many years, construction trade union members, journeymen, and laborers have been aware of the traumatic injuries they could incur due to the dangerous nature of their work. However, in recent years, we have also begun to see the emergence of diseases in construction workers caused from exposure to the very materials that they carried, mixed, formed, cut, shaped or even removed and repaired. Consequently, our members are becoming more and more concerned with the impact of the conditions of their workplace on their health, as well as their safety. We feel that it is time that we express, along with our fellow trade unionists, our concern about the need for federal legislation to address the problems involved in protecting all workers against exposure to these disease-inducing materials.

I believe that now is the time for everyone concerned about the problems created by hazardous materials in the workplace to accept the responsibility for the solutions to these problems. This acceptance of responsibility includes identifying the past and present job-site exposures of workers to these hazardous materials. It should also include full and fair compensation to the diseased workers, and eliminatin of the dangerous work practices that cause exposure to these materials. No facet of our society can be complacent because it has solved its individual piece of the problem. We need legislation that would mandate identification of all potential victims of occupational diseases, and device a system for early detection of occupationally-related diseases. Such legislation must also make allowances for financial restitution to diseased workers and their families.

This is not a matter of abstract concern to the trade union movement. The need to evaluate and design a comprehensive approach to the identification of present and latent victims of occupational diseases has long been recognized. I also realize that as solutions begin to evolve, the potential conflicts will arise. This is because there are so many interested parties associated with the problem—labor, management, the public, the insurance community, manufactuers, and producers. We all are aware of the impact of one such disease, asbestos and asbestos-containing products, have had on the health of people exposed to them. The financial burdens from insurance claims, health and welfare services for asbestos exposure victims, and the costs of litigation are now a matter of record. There is a pressing need to identify and provide an intervention which might alleviate the pain and suffering that can follow the incubation of the dread diseases arising from exposure to asbestos and the many other toxic substances that our members find each day in their workplaces.

All of us in construction remember the decade from 1960–1969; more than 40,000 tons of fireproofing material were sprayed annually in buildings under construction. The estimate today is that more than one million tons of asbestos materials remain in place aboard ships, in buildings, and in process industries. We know that asbestos dust can fill the air when it is disturbed or damaged. Fortunately, we have promoted the use of better work practices and engineering controls through our apprenticeship and training programs to minimize the exposure during removal or repair of in-place, friable asbestos.

Laborers, Asbestos Workers, Painters, and others are exposed to rip-out work; I could name every International Union in the Building Trades, and I'm sure that those individual unions could provide additional situations of exposure.

Boilermakers, like other craft unions, have lodges or locals that represent workers in an industrial setting; but they have also worked on construction sites where it has been estimated that 10,000 to 20,000 tons of asbestos were applied annually to pipes, boilers and other high-temperature equipment in factories, refineries, and power plants.

We have tried to control the exposure of construction workers to in-place asbestos during rip-out work by encouraging the development of specialty contractors to do this work, and discouraging the use of contractors without experience and knowledge.

Researchers at the Mount Sinai School of Medicine have estimated that 7.5 million construction workers are at some degree of risk in developing an asbestos-associated disease. Within the next 20 years, annual excess deaths from asbestos-related lung cancer just among construction workers are estimated to range from 1,405 persons to 1,893. When other cancer deaths are projected, it adds an additional 1,000 to 1,500 deaths to these totals.

There are also other toxic substances in the workplace, the effects of which must be considered in any compensation program. Not so many years ago, Ironworkers would bring bottles of milk to the job when they were welding. They would drink the milk, mistakenly thinking that it would reduce the nausea they would incur from welding either galvanized steel or steel that had been painted with lead-based paint.

That method didn't work very well, but it is an illustration of the immediate and violent reaction of a respiratory system that is being overloaded with toxic welding fumes. When welding is done in confined spaces by trades like Plumbers and Pipefitters, for example, the toxic atmosphere problem becomes magnified. NIOSH has listed deaths due to respiratory disabilities as the number one cause of death among the occupation diseases contracted by workers.

In the construction trades, Painters are exposed to the fumes of paints and solvents; Roofers are exposed to coal tar pitch and asphalt fumes, as well as solvents; Tile Setters, Plasterers, Cement Masons, Carpenters and Bricklayers are all exposed to mixtures and epoxies from which toxic fumes, dusts and mists can evolve. Laborers handle bags, barrels, boxes, cans, drums, cylinders and other containers which may contain hazardous substances. And all crafts on a construction site can be exposed to airborne toxic contaminants. Ironworkers, Pipefitters and Plumbers cut, weld and heat materials coated with paint and anti-corrosive materials that release toxic vapors. Carpenters, Operating Engineers, Electricians—pick any craft in the Building and Construction Trades, and you will find a group of construction workers that has potential exposure to these toxic substances.

It is against this background of danger that a special Building and Construction Trades Department Committee was appointed early in 1983 to study and coordinate efforts with other AFL-CIO departments on all legislation concerning occupational diseases programs. That committee developed several basic questions about such legislation. They are:

(1) How will our members who have been and are potential risks to exposure, gain entry to any system devised to meet their health, economic and social needs, not only for themselves, but for their families when the members are deceased, or worse yet, suffering a "living death"?

(2) What will be the mechanism to identify, label and define the very best procedures and equipment needed to protect those who are presently exposed at their workplace, or those who may face work assignments in the future that will expose them?

(3) How can we insure that such a program will be adequately financed?

(4) How can we insure that such a program will be adequately administered?

(5) How can such a program be designed so that it will become the catch basin for all such future occupational disease problems as may arise, and not be done on a piecemeal basis as we have done in the past, and then only after there has been great suffering by our working people?

(6) How can we insure that the total delivery system will not be outmoded and constantly require upgrading in the futute to serve the people who will be dependent on it?

That occupational disease committee report indicated that an occupational disease bill is necessary and will offer an opportunity for substantial improvement over the present situation, and a great deal of opportunity for real progress towards the day that our country will achieve a comprehensive occupational disease program for working people who are disabled or die as a result of an unsafe or a harmful health environement in the workplace. Our comments are offered in this spirit. The testimony of the AFL-CIO in this and other hearings has outlined in detail the reasons why a legislative effort to provide a comprehensive occupational disease act is so critical to American workers. The statement of the Industrial Union Department has outlined in detail our mutual concern for a legislated "trigger" mechanism that will include additional occupational diseases ina compensation program.

I would like to comment more specifically on the mechanics of financing an occupational disease compensation program. The funding of any proposed occupational disease legislation is of particular importance to both construction workers and their employers. Construction is an occupation with a high degree of mobility. Most of our members work for many different employers during their normal career. Long ago our industry set up multiemployer health and pension funds to accommodate this mobility.

With the long latency periods and multiple exposure problems associated with occupational diseases, we believe that it is essential to have a financing system that will fairly compensate our workers who are made ill and not place the entire cost burden on the "last employer", whose involvement may be minimal. There is serious doubt whether the present state compensation systems can continue to respond to occupational disease claims of the future.

We believe that the responsibility for compensating the workers and their families made ill through cumulative exposure to toxic materials and substances should be placed squarely on those who are responsible for the harm. Any mechanism for paying compensation should place the burden of payment on the manufacturers of the toxic substances. Because of latency and multiple exposure factors, it is appropriate that a compensation fund be created that will have an industry-by-industry orientation.

We do not believe that the American public should pay for the workplace disability caused by exposure to toxic substances.

We recognize that there are many possibilities for funding mechanisms. This is a complex issue, and we would be willing to work closely with any and all groups to develop a mechanism that will provide a certainty of payment, reasonable financing, and a fairness of process to the affected workers and their families.

Mr. Chairman and members of the committee, this is a very serious effort you have started. It means a great deal to our membership in the AFL-CIO. As we have stated, it is not an abstract position for us. It is an urgent need, and we hope that Congress will be responsive to this urgency.

Mr. MURPHY. Mr. Power, you mentioned that there are problems with State compensation systems. What problems do you believe we would come into if we directed the asbestos claims into the State compensation systems?

Mr. ELISBURG. Well, Mr. Chairman, there are any number of questions that have been raised about the ability of the State systems to handle workers compensation occupational disease claims.

Mr. MURPHY. Do you mean in number or in cost?

Mr. ELISBURG. Well, more in restrictions relating to statutes of limitation, in terms of uniformity of determining a medical causation, of levels of benefits, of administrative process. That is, the person going into the State system has kind of a lottery, depending on which State they are in and whether or not that State happens to have focused on occupational disease claims, whether it has statutes of limitations that are reasonable, whether it has a process.

And frankly, it has been fairly well documented that these State systems simply are not responsive to these kinds of occupational disease claims.

Mr. MURPHY. Would it be possible for us to mandate in the Federal law the statute of limitations as a matter of uniformity? Or would we then be impinging on the States' rights?

Mr. ELISBURG. Well, I suppose you get to the point in any Federal-State relationship where, as the Federal Government perhaps mandates standards, mandates benefit levels, mandates eliminations of restrictions, that you may in fact have a Federal system.

And so, the question may come down to who actually carries the piece of paper and does the processing, which is a different question from whether it is a Federal process.

That becomes obviously tricky as to whether, in the process, in the concept of trying to impose the requirements on the State law or the State systems, that you might as well just have the Federal Government do it.

Mr. MURPHY. OK. I have one other question before I turn you over to my colleagues.

I think we both agree that we have got to establish a method of compensation and I would like to see it all-encompassing for red lung and asbestos and textile workers, and maybe we are going to take a look at that, too. But right now we are dealing with this particular measure on asbestos.

I note that in your testimony you particularly stressed that if there is intentional wrongdoing or misconduct on the part of the employer that we should not deny, then, further legal remedies.

Do I detect in that any support for the restricting of the court remedy if it is an ordinary compensation case without intentional misconduct being present? Do I detect a possibility you could support that?

Mr. **Power**. Well, let me address it, and then Don might want to expand on any legal ramifications.

Clearly, in terms of theory, legislation, or Federal legislation that would establish a system for compensation of asbestos or, as we suggest in our companion statements, legislation that would be broader than just asbestos, would politically probably require the quid pro quo of having exclusivity.

We are not afraid to address that concept. We do make the point that there have been cases in recent years where we think the responsibility of manufacturers and producers transcends what would be the normal practice of future legislation.

For example, we see a great at least intellectual linkage between the product liability legislation, which is pending in the Senate, between the Superfund legislation which is pending in both bodies, in the sense that all of these bills, and including your own or any that would be enacted by your subcommittee, address workers both as victims, consumers, and members of a community. They affect workers' rights.

And we just are very dicey about what kind of language is written into the law of the land when it affects our members.

For example, in the product liability area, 50 percent of all product liability suits arise out of the workplace. So, our interest in this area is not frivolous in nature.

Even more importantly, we want a system that is going to work. A system that is set up that sounds good and looks good in a Harvard yard but not in the real world of insurance companies and lawyers is a system that I think we all waste our time on.

Don, you may want to add more.

Mr. **Elisburg** Only to say this, Mr. Chairman. In the testimony that has been given here, there is a distinction drawn between the situation of a worker and that worker's employer. And the federation and the departments have supported the exclusivity with the exception of the intentional harm part.

With respect to manufacturers, that is a different relationship and it is not at all clear that there is a case or that the process should require that kind of a quid pro quo. That is, in term of bringing the traditional workers compensation systems to people who are not part of the employee-employer relationship.

Mr. **Murphy**. We have been joined by Mr. Petri and Mr. Bartlett, and I would ask them if they have questions?

Mr. **Petri**. Would you like to go first?

Mr. **Bartlett**. I have a couple of questions.

Mr. **Murphy**. OK. Mr. Bartlett.

Mr. **Bartlett**. Let me see, Mr. Power, if I understand the gist of your testimony. I apologize for coming in late. I have reviewed it in part and heard a good part of it.

Are you then testifying in opposition to the Murphy bill which has been introduced by the chairman of the committee, or in support of the bill?

Mr. **Power**. Well, what we are attempting to communicate today, Congressman, as we have done in the previous Congress, in the Senate as well, is to outline the parameters and the components that the AFL-CIO believes should be in any legislation that would address this problem.

We appreciate the chairman's introduction of his bill because we want to see the process move along. We have been—long before I was on the staff of the AFL-CIO, my predecessors were before this Congress urging Federal standards for workers compensation.

Many of you may remember Howard McQuiggin, who was at the AFL-CIO. Many a year Howard walked the Halls of the Congress on that one. And we have been here for a long time on OSHA matters and other matters.

We outline, both in my statement and in the accompanying texts from the Building Trades and the IUD, the kind of components that we think would make the most efficient system, that brings justice to injured workers. And to that extent, that is the reason we are here today.

Mr. **Bartlett**. Well, Mr. Power, we all support the chairman, as well as the work that he has done on this legislation. He has done yeoman's service in attempting to resolve that Gordian knot.

If you could, please list for us the more important features of the Murphy bill that you believe to be correct, and list for us the most important features that you believe to be incorrect. Then, if you have reached a conclusion as to whether you support it or oppose it on balance, if you could let us know and if you haven't, tell us that.

Mr. **Power**. Well, in terms of Mr. Murphy's bill we haven't come to a final conclusion. There are a number of elements that we think are addressed in his bill and that are important to us.

For example, I make reference to the legislation that was introduced by Congressman Gaydos and Congressman Hawkins regarding notification of workers.

My colleague, Mr. Mallino, played a major role in helping with that legislation. And Dave, you may want to talk about the importance of that.

We make reference in Mr. Georgine's statement to the fact that we think—and the AFL-CIO has traditionally not supported single shot legislation. We think that there is a manifest case that other disease is just as debilitating to workers as asbestos, should be triggered in, and we propose, as we did in the previous Congress—this is not anything new—that legislation should contain a triggering mechanism with a 30-percent trigger that is explained in the testimony to bring in other debilitating diseases, as well.

David, you might want to talk about the high risk notification bill.

Mr. **Mallino**. Well, it is a part of this whole complex. I mean, Mr. Murphy's bill deals with asbestos. We think asbestos is an important enough issue that it ought to be addressed by the Congress.

But in addition to asbestos, there is a whole raft of other occupational diseases out there on which the scientific information is just as good as it is on asbestos in terms of the harm that it causes.

And why we came here today was to outline what we think that comprehensive program should be.

The asbestos issue is unique enough so that it has to be dealt with as a component of any Federal legislation to address the overall question of occupational diseases. But there are a number of diseases—cotton dust, leukemia from benzidine, lung cancer in coke oven workers, whereas the medical and scientific information in terms of the causality is as good as it is on asbestos, and we believe that those workers have to be addressed in any kind of an overall Federal compensation bill.

We also think that there ought to be some sort of an administrative trigger that would trigger on additional diseases as the Secretary of HHS uncovers additional information in terms of other kinds of hazards. And Jay went through presumptions, benefit levels, funding mechanisms, and this whole question of third-party suits, and the other dimension to that is the feeling that we have as the right to know issue.

Not only do workers have the right to know that they are working with hazardous materials, but we also believe that they have the right to know that they are at risk to disease, and that right to know the risk that they are under is the subject of Mr. Gaydos' and Mr. Hawkins' bill that they have introduced.

And what we would like to see as a part of this overall issue the Congress to do is to at least direct the Government to begin to identify and notify those workers that they know are at risk of disease because of an occupational exposure.

So, in terms of a detailed analysis of Mr. Murphy's bill, we came here today to outline what we think, in addition to Mr. Murphy's approach, that any kind of occupational disease compensation legislation should also include. And we don't think that you can separate, and our position is that we ought not to separate asbestos from the other complex of issues that we are dealing in this overall area.

Mr. BARTLETT. So, the Murphy approach, as I understand it, is to set up a claim system as opposed to the tort system or the lawsuit system. Let me try it this way. Do you support that approach?

Mr. ELISBURG. Well, I think that it is very clear that we are in favor of a system that treats a claims handling approach, a no-fault system, for dealing with the process of both asbestos and occupational disease compensation.

Mr. BARTLETT. OK. So, in the Murphy bill do you support the way that he has done it here, his claim system?

Mr. ELISBURG. I think we are not necessarily prepared to respond in detail to Chairman Murphy's bill at this point. We have laid out some concepts that we feel are approaches that should be taken. I think that my earlier answer to Chairman Murphy, we had some discussion about how some of these situations may interact, particularly with regard to State and Federal relationships.

So, I think we are not prepared to go line by line through that process.

Mr. BARTLETT. OK. Let me then go into a couple of concepts, then.

It seems to me that there are two separate issues with regard to the asbestos and occupational disease.

One is the question of who pays the claims—that is to say, insurers, manufacturers, or the Federal Government, or some combination; and the second one is what system is used to process those claims—that is, is it a court system, the tort system that we have now, the liability kinds of lawsuits, or is it some sort of a compensation system.

And you are saying that you would generally support some sort of a compensation or a no-fault or a claim system?

Mr. **Mallino**. Well, Mr. Bartlett, there are two issues here. One is the issue, the relationship of a worker to his employer.

Mr. **Bartlett**. Right.

Mr. **Mallino**. And for the past 85 years we have supported that relationship being an exclusive relationship and that the employer and/or his workers compensation insurance ought to pay the claims of a worker who was injured or diseased on the job.

The second issue is the relationship of a worker or any other citizen to a third party who may have caused his damage. And in that relationship, we continue to support a worker's right to sue in court any third party who may have injured him.

We think that the way the system is right now nobody is getting workers compensation by and large for asbestos diseases and they are not doing very well in the tort system, either. And we think the Federal Government has got to step in and the Congress has got to step in and work out a system to address that problem, because those people are hurting now.

But those two relationships of the worker; 22 between his employer and the relationship to a third party, we think in terms of concept that those relationships ought to be preserved.

Mr. **Bartlett**. I may be mistaken, but it sounded to me that you said something different than you did. You said that the worker has to preserve his right to sue, and you said that you would urge more of a no-fault system through a claims process. Now, I understand the two different parties. One is a third party and the other was the employer.

Mr. **Mallino**. The whole basis of workers compensation is it is a no fault system in terms of a worker's relationship to his employer.

Mr. **Bartlett**. Right.

Mr. **Mallino**. And we——

Mr. **Bartlett**. But as regards the third parties, how would you do that? Did you say two different things or did I hear it?

Mr. **Elisburg**. No. I think they are not inconsistent. We have been at this a while. I think we understand what we think we want to say.

The fact of the matter is that the third-party lawsuits, in large measure, we think, are driven by the fact that there is no workers comp, adequate workers compensation initially for that employer-employee relationship to pay a no-fault system. So, people are driven to the third-party system.

We have said in previous testimony that where you would have a claims process for the initial claim—that is, the employer-employee related claim—to be a good claims process and good benefits and all of that, that the incentive to file lawsuits would be dramatically reduced, particularly if you had some form of an offset or a system where you did not necessarily get double recovery. That is, the additional incentive to file third-party actions may be there and ought to be preserved, but that that would not be the primary place where the worker would receive adequate compensation.

What we have now is a topsy-turvy situation where because there is the real and perceived feeling that they cannot get any relief under the normal system, they are bypassing that and going right to the third-party actions.

Mr. **Bartlett**. Just one more question along those lines and then I want to ask you about the Wellington concept.

But along those lines, then, I want to make sure I understand your precise position here. You are saying that you believe that you would have us decrease the incentive to go to a lawsuit, a tort lawsuit, by paying more money at the compensation system, but you wouldn't go so far as to make that an exclusive system to prohibit the third-party lawsuit? You would retain the rights of the workers then to dramatically increase the level of payments paid at the compensation system, but then, in addition to that, have the worker be able to step over and file a tort lawsuit? Is that correct?

Mr. **Mallino**. But, what Don just said is that we have, for a number of years, supported an offset, that whatever award a worker may get through a third-party award, that the amount of that award was offset by the amount of workers compensation.

So, the only time you would have an incentive to go to tort is where you had a situation that was so egregious, where someone put something on the market or into the workplace that should have never been there, to take on that kind of a tort system, because we feel that there has got to be some economic incentive in the system to basically make sure that whatever enters the marketplace or the workplace, in terms of equipment or substances, that due care has been taken that dangerous products ought not to be entered into there.

Mr. **Bartlett**. Do you hold out any hope for what is popularly known as the Wellington process? And is there any direction that this committee could take in pursuing that direction?

Mr. **Power**. I would be happy to respond to that, Mr. Bartlett. The AFL-CIO testified about a month ago before the Senate Labor Subcommittee, chaired by Senator Nickles, on the matter of the Wellington plan. Mr. David Silverman, the associate general counsel of the AFL-CIO, testified.

I think I can best summarize his testimony by saying that we have an open mind about the Wellington plan. We are skeptical, perhaps, about its impact eventually on injured workers.

There certainly appears to be at least a partial problem between the producers and a partial solving of the very big problem between the producers and the insurers, although I understand that Manville, if I am correct, that they are not going to be joining the Wellington group.

We would like to hear a little more about it and see more about it before we give it our imprimatur.

We did take note that while there were numerous meetings and numerous working groups, that there were not any representatives of workers, organized or unorganized, that were a part of this process.

I think I can fairly say, during the question and answer period, I think even Senator Nickles' staff was disappointed in the responses of Professor Wellington and the other panelists about the nature of the plan, how many companies and insurers or reinsurers have signed up. I think they, too, shared with us at least a healthy skepticism.

We don't have a closed mind on the plan. We would like to see how it works down the line, and if it can have an impact toward the goal we all share.

Mr. **Bartlett**. Thank you. It has been very enlightening.

Mr. **Murphy**. Mr. Petri.

Mr. **Petri**. Thank you. Representative Bartlett covered many of the points I wanted to raise. But to see if I understood correctly on your last point, on the Wellington plan, you are watching it closely and you think and hope it may be of some help in this area but you are not sure yet?

Mr. **Power**. Well, we hope so. There was a headline on an article in the Post about the testimony the next day that said "Union Official Skeptical of Industry Plan." And I guess that for once we are in agreement with the Post, at least in the noneditorial page statement.

Really, if you had been at the hearing, I think you would see what I mean by the disappointment. I didn't think their witnesses were very forthcoming. I thought that, as is often the case, clearly questions that had been prepared weren't answered candidly.

This issue is too important to us, it has too great an impact on our members to jump onto a bandwagon on it. And yet, on the other hand, we don't want to dismiss it out of hand.

Don, you may want to expand on that.

Mr. **Elisberg**. I was just going to say that when you look at something like this which has been put together kind of in careful secrecy, which may be important for the process, and there is a lot of public relations going on, and you are trying to find out what is actually happening, on the one hand you are looking and saying, all right, you have got 30 or 40 thousand, Lord knows how many cases pending in the courts, which simply cannot handle that kind of mass tort situation—we know that, which is why we are here today.

Having said that, those cases are still pending, something has got to be done and so you say, well, if there is some other process or some other mechanism that is fair and reasonable and does all the right things, sure, anybody should be looking at that because the bottom line is, we have got victims out there who are not receiving compensation from any source.

So, some process that would enable a victim to receive compensation or payment before they have to have a survivor's claim is certainly the kind of thing you would like to do.

Then you have to, you know, look at what is this process and are the insurance companies fighting with each other, are the manufacturers, you know, what is really happening and who is going to mind the store, and that is why, I think, we have this skepticism until we know a good deal more about what this process will actually do.

Mr. **Petri**. Thank you. As we get into this whole area or plow over it again, I am sure you hear the same thing we do in Congress from employers and from insurance companies about what they feel are the infirmities of the tort system. They feel that when you bargain for wages you are looking at the costs employers have and the skyrocketing costs of product liability insurance and the whole new field of these sorts of environmental diseases, as opposed to more usual on-the-job accidents or cataclysmic diseases, that has been growing up. These seem to be throwing the system out of skew and bringing a lot more expenses into the economy than we had in the past.

Are there tradeoffs here? Are you interested at all in exploring possibilities of restrictions in the tort system, possibly in exchange for a stronger compensation system of a no fault nature?

They argue, as you know, that what is happening is you are getting no fault plus the standard of fault has been lowered in practice in the common law and so you are having huge settlements that you never would have had in the past, plus the no fault compensation system, and that sooner or later something is going to snap, because companies are going out of lines of business because they can't get coverage for it, and so on.

Mr. **Power**. Well, I think that is one of the reasons we are seeing the initiatives that Mr. Murphy has put in and other related legislative initiatives. I think that the system has got out of control, and I think that the average victim out there, whether he is a union member or not, is getting the fuzzy end of the lollipop. That is why we have seen so many hearings and we see the initiatives that are occurring.

I think one of the problems probably can be described as an education problem. Let's just assume that we had adopted a Murphy system or a George Miller system or somebody else's system in place now. There would be a certain period of time for workers and consumers to get comfortable with that system, to know that in their real life experience it is going to meet their needs.

That is why I think that the product liability legislation, Superfund, this legislation and others, the Congress is going to be writing some very important bill language in this Congress, and they are going to have interacting effects on workers and consumers for a long time to come.

So, on the one hand we are pleased to see that there is movement, and on the other hand we want to be careful to monitor it so that the trends don't go against the interests of workers and toward the interests of people who already do pretty well in our society.

Mr. **Petri**. All right. I realize it is not directly on the subject of this hearing, but it is clearly related, and it is going to end up probably being a tradeoff or a debate and discussion, and that is the whole product liability area.

It seems to me, representing workers, you have to be somewhat torn, because this is a huge cost of manufacturers. So, are you generally opposed to a product liability law reform?

Mr. **Power**. We have testified last month before the Senate Commerce Committee, our chief counsel testified. We are against the Kastin legislation, S.100.

The AFL-CIO is certainly not against the concept of national product liability legislation. We have been looking at other proposals that are floating around and some of the portions of them that we find sexy. After all, if you are supporting a national system for disease compensation and Federal standards for workers compensation, it would be contradictory to say that you are opposed to at least the concept.

We do contend that the bill language of Mr. Kastin's bill is very damaging to workers. But we would like that committee to explore further other options. The Senate Labor Committee will get a piece of the action on this matter, and it will be on the floor, I would assume.

We are going to be looking at it very closely to see if we can improve any vehicles that move. Again, 50 percent of all product liability suits arise from the workplace. So, it is terribly important legislation to us.

Mr. PETRI. Thank you.

Mr. MURPHY. I think that is all I have now, Mr. Power. However, the subcommittee may have additional questions you and Attorney Elisberg could submit written responses to. Thank you very much.

Mr. POWER. We would be happy to answer them, Mr. Chairman. Thank you for your time, and we look forward to working with you and your staff as this issue moves down the pike.

Mr. MURPHY. Thank you very much.

Mr. POWER. Thank you again, sir.

Mr. MURPHY. The next witness we have scheduled is Mr. Fred Ross, president of Raymark Corp. of Trumbull, CT.

Mr. Ross.

STATEMENT OF FREDERICK J. ROSS, PRESIDENT AND CHIEF EXECUTIVE OFFICER, RAYMARK CORP., TRUMBULL, CT

Mr. ROSS. Good afternoon, Mr. Chairman, members of the subcommittee.

My name is Frederick J. Ross. I am president and chief executive officer of Raymark Corp. of Trumbull, CT.

Raymark is a medium size company which employs about 1,900 people and which manufactures friction materials for brakes, transmission systems, and a variety of other industrial uses.

I want to thank this subcommittee for extending me this opportunity to testify. And I congratulate you, in particular, Chairman Murphy, for convening this hearing and for introducing H.R. 1626, the Asbestos Workers Recovery Act, which is the best legislative vechicle so far for achieving a fair and a comprehensive solution to the asbestos crisis facing our nation.

Raymark, like other past and present manufacturers of products containing asbestos, confronts an enormous problem whose genesis is historical, but whose impact is current and immediate.

Raymark's research efforts have enabled it to reduce its reliance on asbestos in recent years. But products manufactured over a generation ago, in different plants, by different workers, and under different managements, and used at facilities over which our company had no control, have come back to haunt us in the form of thousands of disease claims that are flooding our courts and clouding our economic future.

Chairman Murphy, it has been 2 years since I first testified before this committee and 1 year since I testified before the Senator Labor Committee on this increasingly critical situation.

Frankly, I believe the time for talking is over and I believe the time for action is here. I am therefore particularly heartened at the strong leadership which you are providing and you have provided in your brief tenure as chairman.

I might say, Mr. Murphy, that in the 2 years since I testified before you the last time, our company has gone from a company which employed 4,000 employees to a company that now employs 1,900 employees, as I said, and our net worth at that time was about three times what it is today.

Now, these are the results and this is the kind of toll that this tragic asbestos situation, with its out of control legal costs, is taking on many companies.

As a matter of fact, Mr. Chairman, I heard just before coming into the hearing room that yet another company, 48 Insulations, has filed for protection under chapter 11 of the Bankruptcy Act, making four companies headed by Manville who have now filed as a result of this asbestos litigation.

So, I think you will agree and you recognize, I am sure, that we have a very serious as well as a very urgent problem, and not one that can be put off. We can't wait while some other situation is viewed to see if it works out. We need action today, Mr. Chairman, not in the future.

So, I am heartened by the support that you have already received from 53 other Members of Congress who have joined you in supporting H.R. 1626.

Companies like Raymark, and the injured American workers, turn now to you and to other farsighted Members of Congress for a solution to this national health tragedy.

Asbestos litigation is a grossly inadequate means of providing compensation for injured workers. The costs and the difficulties imposed by asbestos litigation upon an already overburdened civil justice system continue to mount.

Of the more than 30,000 lawsuits filed to date against Raymark Corp. and other companies, over 25,000 are still pending. And a steady stream of new claims will be filed for years to come.

An average of about 550 new plaintiffs seek damages from Raymark each month, totaling approximately $1½ billion. Each day Raymark receives on average claims totaling more than twice my company's net worth.

In the face of such claims, I think you will agree that we have no choice except to defend ourselves and defend ourselves very vigorously.

In 1984 Raymark and its insurers had to spend over $10 million just to fund its legal expenses.

The magnitude of the problem is illustrated by the enormous trial which began in San Francisco just a few weeks ago between 5 manufacturers and 65 insurance companies.

These companies are fighting over claims worth $5 billion. A $210,000 renovation had to be done on a special auditorium just to hold all the lawyers, all of whom are being paid out of dollars which could better be spent in compensating victims.

The Rand Corp. has estimated that of every dollar spent on asbestos claims by manufacturers and insurers, injured workers receive only 37 cents. The remaining 63 cents go to pay lawyers. This, I submit, is an abomination.

Ultimately, it is the victims of asbestos disease who are the hardest hit by this breakdown in the tort systems. Victims with real and immediate need are forced to wait years for a decision.

Our experience at Raymark has been that it takes up to 5 years to resolve many asbestos claims through the courts.

Moreover, jury awards are often unpredictable and inequitable, rewarding one claimant handsomely, while providing equally meritorious claimants with little or nothing at all.

Another example of this, Mr. Chairman, is information that I was provided just before coming up here to testify, on a decision which has just been handed down in a case involving a shipyard worker in Hawaii who contracted cancer, had worked, as I say, in a shipyard, and was awarded $5.1 million. That is a single claimant, $5.1 million.

Yet in many other cases equally worthy claimants go away with little or nothing from the tort litigation process.

The enormous costs associated with this litigation have resulted in a massive and relentless drain on the resources of the companies affected.

Compounding these problems, some insurance companies have refused to pay asbestos claims until ordered to do so by the court.

Executives like me find ourselves in the business of conducting asbestos litigation, rather than in the business of running our companies.

Ultimately, those most at risk are the workers whose diseases do not develop until future years. If the present situation continues and if the assets of all of our companies continue to erode, I leave it to your wisdom, Chairman Murphy, to anticipate who may eventually be left to pick up the tab for these future claimants.

What options are open to us?

Some have argued we should do nothing. But the status quo, with its steady depletion of corporate resources needed to pay claimants, while paying millions of dollars in legal fees, would simply perpetuate a system that serves only the lawyers and not our society as a whole.

A second option is to establish a privately negotiated nonlegislative mechanism, to attempt to solve at least some of the controversy through settlement.

I am sure you have heard—in fact, you talked a few minutes ago with the representatives of labor—about the Wellington group, a number of asbestos producers and insurance companies seeking to establish an improved process for reviewing and settling asbestos claims.

An approach of this kind, if successful, could reduce the enormous costs and the delay of the present litigation.

It is not known, however, at this point how many plaintiffs and how many defendants could actually have their disputes settled through such a private arrangement.

Further, the United States is not a participant at all in the Wellington plan. There is no question in my mind that Federal legislation is the only way to provide a comprehensive solution to all of the aspects of the asbestos compensation crisis.

A third option is to reform the substantive tort law. Such a reform, while warranted, would not have a significant effect overall on asbestos litigation.

The Federal product liability law that was reported favorably last year from the Senate Commerce Committee, and has been reintroduced as S.100, would establish a liberalized statute of limitations and statute of repose, which would actually increase the number of asbestos tort claims that would be filed, and would not address the unique and urgent problems posed by the vast number of asbestos cases clogging our courts.

The breakdown in the civil justice system regarding asbestos is truly unique and unprecedented. In fact, in a recent decision by the U.S. Court of Appeals for the Fifth Circuit, in a case involving my company, the court determined, and I quote, that "a desperate need exists for Federal legislation in the field of asbestos litigation."

The fourth option is to pass legislation establishing an administrative compensation system to replace the existing litigation. Such an option is needed now for asbestos, and this is the option that we support.

Raymark has worked closely for many years with other current and former manufacturers of products that contain asbestos in a concerted effort to support congressional efforts to develop an equitable system of compensating victims of diseases caused by exposure to asbestos.

The largest of our industry's organizations, the Committee for Equitable Compensation, has articulated several fundamental criteria, which I support, for evaluating any proposed legislative solution.

First, claimants must be provided a fair, prompt and adequate administrative remedy as the exclusive substitute for the cumbersome and expensive tort remedy.

All responsible parties, including businesses, insurers and the Federal Government, must contribute to funding the program, and their obligations must be affordable and predictable.

Claims must be decided on the basis of the best medical evidence, without excessive administrative costs or a new bureaucracy.

Finally, there must be a minimum of interference with State workers compensation programs.

Chairman Murphy, of all of the bills that have previously been introduced in both Houses of Congress, I believe that your proposed Asbestos Workers Recovery Act best meets these criteria. It is a major step in the right direction.

I would like to describe three issues that are fundamental to the legislative solution and to explain how the Asbestos Workers Recovery Act establishes a framework for effectively resolving each of these issues.

The most important issue involves who will fund this program.

We of industry certainly intend to contribute our fair share, but we expect other responsible parties to meet their responsibilities, as well.

In particular, the Federal Government has a major obligation because of its important historical role as a partner with industry in undertaking the wartime use of asbestos that resulted in the asbestos disease tragedy.

At my company, Raymark, over 70 percent of our asbestos-related claims have arisen from exposure in the wartime shipbuilding effort.

Looking at the industry overall, of the more than 30,000 claims filed so far that have clogged our court system, more than 50 percent have derived from wartime shipyard exposure.

The Asbestos Recovery Act, relying on this industrywide average, would have the United States contribute 50 percent of the costs of compensation, which I believe is an appropriate proposal.

The United States served as more than an equal partner with private industry in the Government's shipbuilding program during World War II and the Korean conflict. Let me illustrate this with a few stark facts.

In ships constructed or refurbished during the war years, the Government required use of enormous quantities of asbestos, which was specified by name.

The Government itself virtually nationalized the asbestos industry by stockpiling, importing, selling and allocating raw asbestos fiber and other asbestos products to private suppliers and construction companies. The Government in every respect was a full-fledged supplier of asbestos.

The United States directly employed over a million shipyard workers, and at both Government and private yards the Government assumed control of the workers' health and safety.

According to Government documents, declassified in just the last few years, the United States was more concerned with wartime ship production than with tight enforcement of asbestos safety standards, even though the Government knew of the risks of asbestos exposure in the workplace. This may well have been appropriate under wartime conditions, but it certainly is not appropriate for industry to be left alone to bear the entire cost.

Mr. Chairman, I am proud of the part that my company played in the defeat of the axis powers over a generation ago.

During World War II my company's facilities received a dozen special awards from the Army and Navy in recognition of excellent service in producing materials needed to win that war. To qualify for these prestigious "E" awards, our plants had to not only achieve outstanding production records, but equally had to meet strict health and safety criteria.

And I might say that during this period our plants were recognized in each of the States in which they operated—North Carolina, Pennsylvania, and Connecticut—as exemplary plants in terms of the health and safety conditions that were maintained in those plants at that time.

How ironic it is to come back now 40 years later and find us paying the bill for the Federal Government which did not likewise adhere to similar standards.

The Government used our products to protect the lives of those who went off to battle by installing the most effective known insulation and fireproof materials in the ships of the Navy and merchant marine.

But now, over 40 years later, the legacy of this partnership with the Government is a health tragedy affecting those patriotic Americans who stayed behind to build the ships.

In such a situation, I believe it is incumbent on Congress to instruct the Government to contribute its fair share to help compensate these injured workers.

Mr. Chairman, I oppose any bailout of industry on the part of Government, but I submit that it is equally as repugnant and economically ridiculous to have the industry bailing out the Government in a situation such as this asbestos tragedy.

Significantly, Mr. Chairman, the American people also agree that the Government should share responsibility for the asbestos tragedy.

In a recent national public opinion survey conducted by Cambridge Reports, Inc., almost 80 percent of those surveyed stated that the Government should share the responsibility for compensating workers with asbestos-related injuries as a result of the wartime shipbuilding effort.

But equity aside, an administrative compensation remedy would actually save the Government money in the long run.

In fiscal 1985 the Government has budgeted $200 million to pay for asbestos litigation, including costs of lawyers, courts, and possible settlements and judgments.

Participating in an administrative compensation system would save substantial amounts for the Government which could offset a major portion of the Government's share of responsibility for funding the system.

Furthermore, emerging legal trends, as illustrated by the Supreme Court's Lockheed Decision and the recent *Shuman* case, indicate the Government is in real danger of being found liable for a substantial portion of the asbestos tort costs.

In recent testimony, the head of the Justice Department's Civil Division disclosed that Government lawyers are now handling over 2,700 cases in which individuals and asbestos manufacturers are asking the Government to be held liable in over 60,000 claims.

He predicted that by 1990 over 200,000 asbestos claims for over $38 billion could be pending against the Federal Government.

If the Government is to avoid the enormous risk of loss, it is in the United States' best long-term financial interest to contribute, along with its industrial partners, to the funding of an administrative compensation system for asbestos.

A second point involves the structure of a compensation program.

Some legislative proposals have advocated that the responsibility for asbestos should be shifted from existing State workers compensation agencies to a new Federal workers compensation program, to be administered by the Federal Labor Department.

However, I do not believe that it is time to give up on the existing State workers compensation system, a proven system which is already in place and that can provide an efficient mechanism for processing asbestos claims and avoid the need for creating a new and expensive bureaucracy.

To preserve the integrity of the existing compensation mechanisms, the Asbestos Workers Recovery Act would establish a new asbestos remedy that replaces tort remedies, but that supplements, rather than replaces, existing workers compensation.

Finally, the Asbestos Workers Recovery Act recognizes that all of our liability insurance policies paid for over the past three decades should be available to us.

Mr. Chairman, the task at hand is to assure worthy claimants of prompt, certain and fair compensation and to eliminate the enormous and wasteful costs and inequities of the existing system.

The existing situation, which inundates our courts, plagues American business, and imposes unfair burdens on injured workers, while it only helps lawyers, must come to an end.

By introducing the Asbestos Workers Recovery Act, Chairman Murphy, you have taken a major step toward reaching a comprehensive solution to this national problem.

In the weeks and months ahead, I pledge that I and others in my company will offer whatever assistance we can to you and your staff, should you need further help, to ultimately enact this worthy legislation.

Thank you very much. I would be pleased to answer any questions you may have.

[The prepared statement of Frederick J. Ross follows:]

PREPARED STATEMENT OF FREDERICK J. ROSS

Mr. Chairman and Members of the Subcommittee: My name is Frederick J. Ross. I am President and Chief Executive Officer of Raymark Corporation of Trumbull, Connecticut. Raymark is a medium-sized company of 1,900 employees, which manufactures friction materials for brakes, transmission systems, and a variety of industrial uses.

INTRODUCTION

I want to thank this Subcommittee for extending me this opportunity to testify. And I congratulate you, in particular, Chairman Murphy, for convening this hearing and for introducing H.R. 1626, the "Asbestos Workers' Recovery Act"—which is the best legislative vehicle so far for achieving a fair and comprehensive solution to the asbestos compensation crisis facing our nation.

Raymark, like other past and present manufacturers of products that contain asbestos, confronts an enormous problem whose genesis is historical but whose impact is current and immediate. In recent years, Raymark's research efforts have enabled it to reduce its reliance on asbestos.[1] Nevertheless, products manufactured over a generation ago, in different plants, by different workers, under different managers—and used over a generation ago at facilities over which our company had no control—have come back to haunt us, in form of thousands of disease claims that are inundating the courts and clouding our economic future.

The number and complexity of these claims and the huge economic, social, and legal problems they have spawned represent a national tragedy. Existing mechanisms are simply incapable of providing prompt and equitable compensation for asbestos-related diseases. Moveover, the compensation they do provide comes at a price in transaction costs that no one can afford to bear: not the manufacturers or their insurers, not the public, and certainly not the disease victims.

Chairman Murphy, it has been two years since I first testified before this Subcommittee and one year since I testified before the Senate Labor Subcommittee on this increasingly critical situation.[2] Frankly, I believe, the time for talking is over and

---

[1] Raymark manufactures and markets friction materials for brake and transmission systems utilized in cars, trucks, buses, tractors, and construction equipment. Although there are some applications where no substitutes have yet been found, Raymark has successfully developed numerous asbestos-free products. The asbestos-containing products we manufacture today employ encapsulated asbestos fibers that are generally believed to pose little or no health risk.

[2] Hearing on H.R. 3175 Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor, 98th Cong., 1st Sess. (June 13, 1983); Hearing Before the Subcomm. on

Continued

the time for action is here. I am therefore particularly heartened by the strong leadership you have exhibited in your brief tenure as Chairman.

I am also heartened by the support you have already received from the 53 other members of Congress who joined you as cosponsors of H.R. 1626. Companies like Raymark—and the injured American asbestos workers—turn now to you and to other farsighted members of Congress for a solution to this national health tragedy.

I. THE NATURE OF THE PROBLEM

Asbestos litigation is a grossly inadequate means of providing compensation for injured workers. The Rand Corporation has estimated that, of every dollar spent on asbestos claims by manufacturers and insurers, injured workers receive only 37 cents.[3] Thus, of the over $1 billion in compensation and litigation expenses that has been spent on asbestos claims, fully 630 million dollars have gone to attorneys and others who thrive from the present litigation, not to the victim at all. This, I submit, is an abomination.

The costs and difficulties imposed by asbestos litigation upon an already overburdened civil justice system—and upon the claimiants who must depend on it, and upon our companies that must pay for it—continue to mount:

Of the more than 30,000 lawsuits to date filed against former and present manufacturers or installers of asbestos-containing products and their insurance companies, over 25,000 cases are still pending.[4] Because of the long latency period for asbestos diseases, we anticipate a steady stream of new claims for years to come. One study has estimated that the total will probably exceed 52,000 claims by the early years of the next century.[5]

An average of about 550 new plaintiffs seek damages from Raymark each month, totalling approximately one and a half billion dollars. Each day, Raymark receives, on the average, claims totalling more than twice my company's net worth. In the face of such claims, we have no choice but to defend ourselves vigorously.

The magnitude of the problem is illustrated by a massive trial which began in San Francisco just a few weeks ago, between five manufacturers and more than 50 insurance companies, who are fighting over claims worth 5 billion dollars, a $200,000 renovation had to done on a special auditorium merely to accommodate the more than 100 lawyers participating in the case[6]—all of whom are being paid with dollars that could be better spent by compensating the victims.

My company, Raymark, alone has incurred over $30 million in asbestos litigation-related costs in the period since 1980.

A. Unfairness to present claimants

Ultimately, it is the victims of asbestos disease who are the hardest hit by this breakdown of the tort system. The normal legal procedures for handling these claims is so inefficient that victims with a real and immediate need are forced to

---

Labor of the Senate Comm. on Labor and Human Resources, 98th Cong., 2nd Sess. (April 30, 1984).

See also Statement on behalf of the Committee for Equitable Compensation presented by John L. Baldwin at Hearing Before the House Labor Standards Subcomm., 98th Cong., 1st Sess. (Feb. 10, 1983); Statement on behalf of Raymark Corporation presented by Kenneth R. Feinberg at Hearing Before the Subcomm. on Courts of the Senate Comm. on the Judiciary, 97th Cong., 2nd Sess. (Nov. 10, 1982); Statement of the Asbestos Compensation Coalition ("ACC") submitted to the House Labor Standards Subcomm., 97th Cong., 2nd Sess. (Sept. 9, 1982); Letter on behalf of the ACC submitted by William C. McLaughlin to Hon. George Miller on May 4, 1982; Statements on behalf of the ACC presented by William C. McLaughlin, G. Earl Parker, John L. Baldwin, and Victor L. Drexel at Hearing Before the House Labor Standards Subcomm., 97th Cong., 2nd Sess. (April 21, 1982).

[3] Kakalik et al., Variation in Asbestos Litigation Compensation and Expenses, at xix (The Rand Corporation, 1984).

[4] Almost all of the suits were instituted not by our own employees, but by the employees of other companies, on various theories of product liability. This staggering number of law suits does not include workers' compensation claims filed against the various manufacturers.

[5] Prior to its filing under Chapter 11 of the U.S. Bankruptcy Code, the Manville Corporation commissioned an epidemiological study which projected a total of more than 52,000 lawsuits by the year 2010. See The Manville Bankruptcy and the Northern Pipeline Decision, Hearing Before the Subcomm. on Courts of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 24 (Nov. 10, 1982); Oversight Hearing on the Effects of the Manville and UNR Bankrupties on Compensation of Asbestos Victims, Hearing Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor, 97th Cong., 2d Sess. 53-56 (Sept. 10, 1982).

[6] See The New York Times, March 5, 1985 at Section D, page 8, col. 3; Mealey's Litigation Reports, February 26, 1985, at 1902.

wait years for a decision. Our experience at Raymark has been that it takes up to five years to resolve many asbestos claims in the courts.

Moreover, jury awards are often unpredictable and inequitable, rewarding one claimant handsomely, while providing equally meritorious claimants little or nothing. Legal technicalities prevent recovery by many others.

A poignant example well illustrates this inequity. Richard J. Hogard and Robert L. Hance were insulation workers in the same shipyard at Long Beach, California, in the 1960s. Hogard claimed to have been disabled by asbestosis, sued for compensation in California, and was awarded one million dollars by the jury. Hance also claimed to have been disabled by asbestosis, sued in Wyoming, and was awarded nothing.

The Chaper 11 filings of the Manville Corporation, UNR Industries, Inc., and Amatex Corp. have confronted present disease claimants with the prospect of even greater delays and more uncertainty. Just how and when these claims against the Chapter 11 companies will ever be resolved—and for how many cents on the dollar—is anybody's guess.

B. The enormous drain on resources

The enormous costs associated with this litigation have resulted in a massive and relentless drain on the resources of the companies affected. In 1984, Raymark and its insurers spent over $10 million just in legal defense fees in connection with the litigation of asbestos disease claims. Of the 78 cases tried to verdict since January 1, 1982, Raymark won 42. These courtroom victories were in some sense Pyrrhic, however, because the combined cost to Raymark and its insurers for litigating these cases was over $2 million! Based on these figures, if Raymark and its insurers were to go to trial on each of the 19,338 pending cases (involving 23,910 plaintiffs) in which we have been named as a defendant, our combined costs would amount to $1 billion—even if we won every single case! It is true that efforts to streamline litigation have recently resulted in some savings per case in defense costs, but since the number of filings continues to multiply, aggregate costs have continued to rise.

Compounding these problems, some insurance carriers have refused to pay asbestos claims until ordered by a court to do so. As a result, many manufacturing companies that paid millions of dollars in insurance premiums over the years cannot obtain the benefits of their insurance policies until after the completion of protracted and very expensive litigation.[7]

Scores of cases are currently being litigated around the country on the question of which insurance policies should cover losses resulting from asbestos-related disease. The massive San Francisco litigation already mentioned—in which over 100 attorneys are invovled in a $5 billion lawsuit between 5 manufacturers and more than 50 insurance companies—is but one example.

Possibly the worst aspect of the ongoing insurance disputes is their promise to continue. Despite the standardized language used in nearly all of the liability insurance policies issued during the relevant time periods, various courts have applied the same language in different ways. It is doubtful whether full uniformity of interpretation can ever be achieved in the courts.

The time, effort, and dollars spent in such complex and protracted litigation could more usefully be put to other, more worthwhile purposes—including the development of asbestos-free products and compensation of disease victims. Quite simply, executives like me find ourselves in the business of conducting asbestos litigation, rather than in the business of running our companies.

C. Financial uncertainty for business operations

Furthermore, the enormous uncertainties and delays under the existing tort system prevent us from being able to accurately plan our financial future. This uncertainty derives not only from our inability to predict the outcome of tens of thousands of lawsuits or the number of claims that will be filed in the years to come, but also from the ongoing insurance disputes that I just described.

---

[7] In November 1983, Febraury 1984, July 1984, and October 1984, the Cook County, Illinois, Circuit Court issued orders that require certain of our insurance carriers to assume the liability and defense costs of pending and future asbestos-related litigation. *Zurich Ins. Co.* v. *Raymark Indus., Inc.*, No. 78 L 8760, [Nov. 25, 1983 issue] Asbestos Lit. Rptr. (Andrews Publications) at 7470 (Cook Co., Ill, Nov. 18, 1983.)

Prior to the November 1983 order, Raymark has been forced to absorb a substantial portion of the costs associated with asbestos litigation. The company's share was $7.3 million in 1983 and $9.1 million in 1982.

Indeed, in Raymark's case, independent accountants give only qualified approval to our balance sheets. These developments have made it extremely difficult for Raymark to raise capital from the debt or equity markets.

Mr. Chairman, Raymark is determined to avoid the shelter of the bankruptcy court. However, because of the Chapter 11 filings by Manville, UNR, and Amatex, our existing commercial creditors demanded and received security for their loans. These security provisions limit the assets available to benefit future disease claimants, and appreciably increase the company's cost of borrowing.

D. The threat to future victims

Ultimately, Mr. Chairman, those most at risk are the workers whose diseases do not develop until future years. As I have already emphasized, the massive litigation diverts both financial resources and attention from business operations whose continuity is essential for the payment of these claims. Certainly in Raymark's case, the multiplication of financial uncertainties has meant that an increasing proportion of our company's assets are pledged to our commercial creditors and would be unavailable to pay future disease claims.

If the present situation continues, and if the assets of all of our companies continue to erode, I leave it to your wisdom, Chairman Murphy, to anticipate who may eventually be left to pick up the tab for these future claimants.

II. THE NEED FOR A LEGISLATIVE SOLUTION

Perpetuation of the status quo, with its steady depletion of these necessary resources, cannot be tolerated. But what does the corporate officer, who inherited this crisis, do to meet his obligations, not only to asbestos victims and their families, but to the corporation's shareholders and employees?

A. Options

What are the options available to us? As I see it, we could either do nothing, seek to develop non-legislative mechanisms, enact federal product liability legislation, or establish an administrative compensation program for asbestos.

1. Do Nothing: Some have argued that we should do nothing. But those who advocate this position are not those who are confronted by the problem. The status quo—with its steady depletion of corporate resources needed to pay claimants, while paying millions of dollars in legal fees—would simply perpetuate a system that serves only the lawyers and not our society as a whole.

2. Non-legislative Mechanisms: A second option is to establish privately negotiated non-legislative mechanisms, to attempt to resolve at least some of the controversy through settlement. I am sure you have heard about the "Wellington Group"—a number of asbestos producers and insurance companies seeking to establish an improved process for reviewing and settling asbestos claims. Such an approach, if successful, could reduce the enormous cost and delay of the present litigation.

It is not yet known how many plaintiffs and how many defendants can have their disputes actually resolved by such private arrangements. Further, the United States is not a participant at all. There is no question in my mind that federal legislation is the only way to provide a comprehensive solution to all aspects of the asbestos compensation crisis.

3. Federal Product Liability Legislation: A third option is to reform the substantive tort law. But such a reform, while warranted, would not have a significant effect, overall, on the asbestos litigation.

It is important to understand what product liability reform can—and cannot—do regarding asbestos. Senator Kasten's product liability bill, which was reported favorably last year by the Senate Commerce Committee, and has been reintroduced as S. 100, would have the following principal effects on the asbestos litigation:

Increased uniformity and predictability in the product liability system.

The statute of limitations and statute of repose would allow additional asbestos claims to be filed in several states.[8]

S. 100 would establish a "discovery rule" form of statute of limitations, preserving the right of some asbestos victims to sue in several states where their claims would be barred today. Under section 14 of S. 100, a civil action will not be barred if it is—filed within 2 years of the time the claimant discovered or, in the exercise of reasonable prudence, should have discovered the harm and its cause . . . . By way of contrast, the New York statute begins to run as soon as a person is exposed, see *Steinhardt* v. *Johns-Manville Corp.*, 54 N.Y.2d 1008, 430 N.E.2d 1297, 446 N.Y.S.2d 244 (1981), appeal dismissed, 456 U.S. 967 (1982); and the Virginia statute begins to run at the time the disease first developed, see *Locke* v. *Johns-Manville Corp.*, 22, Va. 951, 959,

Continued

A rule imposing liability on the basis of what manufacturers should reasonably have known about asbestos risks, which is similar to the rule already in effect in almost all jurisdictions, and which would affect the outcome of few asbestos cases.[9]

Thus, S. 100 would actually increase the number of asbestos tort claims that would be filed. By establishing uniform rules for all jurisdictions, the bill might facilitate some settlements and reduce some litigation costs for asbestos claims. However, it would not address the fundamental problems of the asbestos litigation.

For ordinary product-liability cases—involving, for example, an individual defective machine, an immediate and identifiable injury, and clearly identifiable parties and manufacturers—establishing simplified and uniform rules, as S. 100 is designed to do, should make settlement or litigation significantly quicker and more efficient. However, an asbestos-related case presents complications that product liability reform simply cannot address.[10] And even beyond the question of expense and delay in resolving each individual claim, S. 100 could do nothing about the enormous burden on our courts and our companies posed by the sheer number of existing claims and by the insurance litigation.

Thus, even though S. 100 is an appropriate legislative response for ordinary product liability cases, this bill would not significantly address the breakdown in the civil justice system regarding asbestos, which is truly unique and unprecedented. No other product has come close to generating the massive amount and complexity of litigation that we face regarding asbestos. In fact, the American Bar Association—the most prominent representative of our nation's lawyers—has called this problem a "castastrophic phenomenon on a national scale to asbestos workers and the asbestos industry," and the ABA now favors "appropriate federal legislation to establish methods to provide adequate compensation" to those suffering from asbestos-related diseases.[11]

This view is being expressed even by members of the judiciary, who must daily confront the tidal wave of asbestos litigation. In a recent case decision regarding asbestos by the United States Court of Appeals for the Fifth Circuit, in a case involving my company Raymark, the court determined that "a desperate need exists for federal legislation in the field of asbestos litigation."[12] All 13 circuit judges who heard the case agreed that federal legislation for asbestos is called for.[13]

---

275 S.E.2d 900, 905 (1981). Because asbestos-related diseases develop over a period of many years, such rules cut off many claims before the victim either knows or has reason to know of the harm and its cause.

The statute of repose in section 11 of S. 100, which ordinarily terminates the right to bring suit 25 years after date of delivery of capital goods, does not apply to latent injury such as caused by asbestos. This is a more victim-oriented rule than the which applies now in some states.

[9] Most asbestos claims are based on the manufacturers' failure to warn. In almost all jurisdictions, there is in one way or another a requirement of proof that the defendant knew or had reason to know about the risk of asbestos harm before liability can be imposed. S. 100 would retain such a requirement. New Jersey has imposed "absolute liability" on the manufacturers of asbestos, even though they neither knew nor had any reason to know about asbestos risk. See *Beshada* v. *Johns-Manville Products Corp.*, 90 N.J. 191, 447 A.2d 539 (1982). Accord, *Halphen* v. *Johns-Manville Sales Corp.*, 737 F.2d 462, 465 (5th Cir. 1984) (appolying Louisiana law). S. 100 would serve to replace this rule of "absolute liability." However, the New Jersey rule has not been adopted by the vast majority of states, and replacing the rule of absolute liability would affect the outcome of few asbestos cases.

[10] Generally, asbestos health claims—

are not brought until 20-40 years after exposure to asbestos fibers;

in many cases, involve insulation workers who were employed by several companies over a period of years;

involve employers who purchased asbestos from several suppliers over a period of years, thus creating uncertainty as to which suppliers are responsible for a claimant's harm;

involve suppliers each of whom purchased insurance from several insurers during the years they mined, imported, or manufactured asbestos or asbestos- containing products, thus creating uncertainty as to which insurer is liable for a claimant's harm.

Typically, an average of sixteen corporations are named as defendants in each asbestos suit; each of these corporations has ordinarily been insured by several insurance carriers; and the key events occurred decades in the past. Thus, even if damages and causation are clearly established, determining the responsible defendants and their share of the damages is very difficult and costly. S. 100 could not significantly reduce these problems.

[11] Recommendations to the House of Delegates by the ABA Special Committee to Study Product Liability ¶ 11 (1983), approved by voice vote at the ABA Mid-Year Meeting in New Orleans (February 1983).

[12] *Jackson* v. *Johns-Manville Sales Corp., 750 F.2d 1314, 1327 (5th Cir. 1985).*

[13] Id. (en banc majority opinion of 7 circuit judges); 750 F.2d at 1329 (opinion of one circuit judge, concurring in the majority opinion); 750 F.2d at 1332 (opinion of 5 circuit judges, dissent-

Continued

Thus, even if S. 100 were enacted, the crush of the vast number of existing claims, including the tremendous legal and other costs in resolving them, could still result in the worst of all worlds—desperate courts, insolvent product sellers, and uncompensated claimants.

4. Administrative compensation system for asbestos: The fourth option is to provide an administrative compensation system to replace the existing litigation. Such an option is needed now for asbestos, and this is the option that I support.

B. Necessary Elements of a Legislative Solution

Raymark has worked closely for many years with other current or former manufacturers of products that contain asbestos, in a concerned effort to further and support congressional efforts to develop an equitable system of compensating victims of diseases caused by exposure to asbestos. The largest of our industry's organizations, the Committee for Equitable Compensation,[14] has articulated the following ten fundamental criteria—which I support—for evaluating any proposed legislative solution:

First, the program must pay an adequate benefit.

Second, claims must be processed and paid promptly.

Third, claims must be determined on a no-fault basis if the enormous litigation costs and delays are to be avoided.

Fourth, the program must totally eliminate tort litigation and provide an exclusive remedy.

Fifth, all responsible parties—including businesses, their insurers, and the federal government—must contribute to the program's funding.

Sixth, the program must be affordable, and parties' obligations must permit sound financial planning and funding.

Seventh, claims must be decided on the basis of the best medical evidence and expertise.

Eighth, administrative costs must be strictly limited.

Ninth, new bureaucracies must be avoided.

Tenth, the program must operate with minimum interference in state workers' compensation programs.

Chairman Murphy, of all the bills that have been previously introduced in both houses of Congress, I believe that your proposed "Asbestos Workers' Recovery Act" best meets these criteria. It is a major step in the right direction.

III. ISSUES DESERVING PARTICULAR ATTENTION BY THIS SUBCOMMITTEE

I would like to describe four issues that I believe are fundamental to any legislative solution, and to explain how the "Asbestos Workers' Recovery Act" establishes a framework for effectively resolving each of these issues.

A. Federal Government responsibility

1. Overview

The most important issue involves who will fund this program. We of industry certainly intend to contribute our fair share, but we expect other responsible parties to meet their responsibilities as well. In particular, the federal government has a major obligation because of its important historical role, as a partner with industry, in undertaking the wartime use of asbestos that resulted in the asbestos disease tragedy.

At my company Raymark, over seventy percent of our asbestos-related claims have arisen from exposure in the wartime shipbuilding effort. Looking at the industry overall, of the more than 30,000 asbestos-related claims that have clogged our court system, more than fifty percent have derived from wartime shipyard exposures. The "Asbestos Workers' Recovery Act," relying on this industry-wide average, would have the United States contribute fifty percent of the costs of compensation—which I believe is an appropriate proposal.

The United States served as a more than equal partner with private industry in the government's shipbuilding program during World War II and the Korean con-

---

ing from the holding of the majority, but "agree[ing] that legislation would be the preferred solution to the dilemma of providing an adequate scheme for the proper distribution of [asbestos] compensation"). One circuit judge did not participate in the case.

[14] The present members of the Committee for Equitable Compensation are: Celotex Corporation; Eagle-Picher Industries, Inc.; Fibreboard Corporation; Flintkote Company; Keene Corporation; Owens-Corning Fiberglas Corporation; Owens-Illinois, Inc.; Pittsburgh-Corning Corporation; and Rock Wool Manufacturing Company, Inc.

flict. Those same partners—industry and government—should now form a peacetime partnership to share the financial burden of the tragic asbestos legacy of the wartime shipbuilding effort.

The extent of the wartime partnership between industry and government cannot be overstated. In 1942, the U.S. War Production Board reported, "Every worker and every factory, every bit of material and every machine is now part of the war program. No use of materials is unimportant and no company has the right to think of its own operation except in connection with the war program." [15] The partnership in wartime shipbuilding is further described:

> The combination of government regulation and private enterprise through which American industry operated during World War II was a strikingly decentralized kind of administered economy. In shipbuilding all major problems of production—management, labor supply, capital, and materials—were tackled directly by both private corporations and government agencies. Both acted to draw managerial talent from other fields of activity. Both placed orders for materials and components. Both campaigned to add a million to the labor force in the shipyards, and by joint action they created the conditions that made the workers want to come. The distribution of materials, the financing of operations, and the application of efficient engineering became problems both for corporation managers and government officials. Consequently the history of shipbuilding in World War II is at once a history of private enterprise and of government activity.[16]

The government played the leading role in the use of—and excessive exposure to—asbestos in wartime shipbuilding. Let me ilustrate this with a few stark facts:

In ships constructed or refurbished during the war years, the government required use of enormous quantities of asbestos which was specified by name.

The government itself virtually nationalized the asbestos industry—by stockpiling, importing, selling, and allocating raw asbestos fiber and other asbestos products to private suppliers and construction companies. The government in every respect was a full-fledged supplier of asbestos.

The United States directly employed over 1 million shipyard workers; and, at both government and private yards, the government assumed control of workers' health and safety.

According to government documents declassified in the last few years, the United States was more concerned with wartime ship production than with tight enforcement of asbestos safety standards—even though the government knew of the risks of asbestos exposure in the workplace. This may well have been appropriate under wartime conditions, but it is certainly not appropriate for industry to be left to bear the entire cost.

Mr. Chairman, I am proud of the part my company played in the defeat of the Axis powers over a generation ago. During World War II, the Army and Navy issued "E" awards to the top 5 percent of the nation's war production plants. My company's facilities received a dozen of these special awards, in recognition of excellent service in producing materials needed to win the war. To qualify for these prestigious "E" awards, our plants had to meet strict health and safety criteria in addition to achieving an outstanding production record.

The government used our products to protect the lives of those who went off to battle, by installing the most effective known insulation and fire-proofing materials in the ships of the Navy and merchant marine. But now, over 40 years later, the legacy of our partnership with the government is a health tragedy affecting those patriotic American workers who stayed behind to build the ships.

In such a situation, it is incumbent on Congress to instruct the government to contribute its fair share to help compensate the injured workers.

2. Federal Involvement in Wartime Use of Asbestos.

I would like to describe in greater detail the government's central role in the wartime use of asbestos, especially in the shipbuilding program. (For an even more extensive discussion of the government's role in the wartime shipbuilding effort, I refer you to my testimony two years ago before this Subcommittee and my testimony last year before the Senate Labor Subcommittee.[17]

(a) *Size of the shipbuilding program.*—The dramatic surge in asbestos consumption in this country in the 1940s can be traced directly to the federal government's breakneck, no-holds-barred program to expand America's one-ocean navy into a war-ready seven-seas navy.[18] From 1940 to 1945, private shipyards as well as government-owned facilities, operating with round-the-clock urgency, built over 7,000 new naval and merchant vessels, more than in the whole previous history of United States shipbuilding.[19] During this same period, over 67,000 ships were converted or repaired.

---

[15] U.S. Production Board, Priorities and Industry (Aug. 1942).

[16] Lane, F.C., Ships for Victory—A History of Shipbuilding Under the U.S. Maritime Commission in World War II 1 (1951) [hereinafter cited as "Ships for Victory"].

[17] See note 2, supra.

Some 4.5 million workers were employed in this crash shipbuilding effort,[20] with nearly 25 percent of this workforce employed directly by the federal government.[21] It is thought that nearly 40 percent of the 27.5 million workers estimated to have been exposed to asbestos since 1940—11.2 million workers—were exposed in the 1940s during the peak of this wartime shipbuilding effort.[22]

(b) *Government-mandated use of asbestos.*—Every ship constructed or refurbished during the war years made extensive use of asbestos products. Because its fire resistant and tensile strength qualities were not present in any other materials, asbestos was the only choice for many uses in the shipbuilding effort, including floor tiling for ship decks, electric cabling, insulation, and piping system gaskets and packing. For example, my company Raymark (then known as Raybestos-Manhattan, Inc.) produced a series of asbestos-containing products as part of this war effort, including heat-resistant cloth, tape and thread, and asbestos blankets for engine room safety.

For each shipboard asbestos product—including Raymark's and those of other manufacturers—the government had an elaborate set of specifications. In the vast majority of cases, the government required asbestos by name, at times actually changing specifications to require asbestos-containing products, regarding the alternatives as unsatisfactory.[23] Thus, manufacturers had to use asbestos to meet government standards. Though asbestos manufacturers assisted in supplying asbestos products, the federal government mandated not only that asbestos be used in shipboard products, but the specific amount and type of asbestos to be used as well.

(c) *Government responsibility for the workforce and awareness of health risks.*—As mentioned above, roughly 25 percent of the total workforce in all of the country's shipyards during the war years—approximately 1.1 million military and civilian shipyard workers—were employed directly by the United States.[24]

Equally important, however, although the ownership status of the private shipyards did not change, the government assumed virtually full control over the millions of private shipyard workers who labored under close and immediate federal supervision made necessary by wartime conditions. Like the soldiers in battle, those who labored in the war production factories and shipyards took their orders from the government. In many cases, shipyard workers were given special exemptions from military service because their skills were deemed more valuable in serving their country at home than on the warfront. In effect, the federal government employed these workers who labored in private shipyards jsut as it employed the sailors and seamen who crewed the ships after they were launched.

Federal government supervision of the labor force in the shipbuilding effort was pervasive. It included such traditional management functions as determination of how many workers to hire, participation in collective bargaining negotiations and daily supervision of every aspect of the shipbuilding process.[25] Such close and continuous supervision extended beyond the shipyards to the plants of companies—like Raymark—that supplied the asbestos products demanded by the government.

---

[18] An average of 465,000 short tons, more than double the average annual tonnage used in the 1930s, were consumed in each year from 1940 through 1949. Figures calculated from United States Department of Interior, Bureau of Mines Minerals Yearbook 1972: Asbestos at 4, Table 3 (1973).

[19] See Smith, H.G. and L.C. Brown, "Shipyward Statistics" in 1 The Shipbuilding Business in the United States of America 122-123, Tables 45, 46 (F.G. Fassett, Jr., Ed. 1948) [hereinafter cited as "Shipyard Statistics"]; Fischer, G.J., A Statistical Summary of Shipbuilding Under the U.S. Maritime Commission During World War II, Historical Reports of War Administration, U.S. Maritime Commission, No. 2, Table B-1 (1949).

[20] See Selikoff, I.J., Disability Compensation for Asbestos Associated Disease in the United States, Report to the U.S. Department of Labor, Contract No. J-9-M-8-0165, at 120, Table 2-12 (June 1981). *See also* Hogan, M.D. and D.G. Hoel, "Estimated Cancer Risk Associated with Occupational Asbestos Exposure," in 1 Risk Analysis 68 (1981) (estimated 4.3 to 5.4 million shipyard employees).

[21] This estimate is based on both government and private sources, "Shipyard Statistics," *supra* note 19, at 189; U.S. Department of Labor, Bureau of Labor Statistics, Employment and Earnings, United States, 1909-71 276.

[22] Selikoff, supra note 20, at 120, Table 2-12.

[23] See letter from Commandant, Navy Yard, Boston, to Bureau of Ships, 559 (MEFX 1/28) (January 20, 1943); letter to Commandants of all Navy Yards, Supervisors of Shipbuilding and Industrial Managers, from Chief of the Bureau of Ships, S 39-1 (3648) (October 15, 1942).

[24] See supra note 21.

[25] See Ships for Victory, supra note 16, at 268-87, 482-85, 663-70.

This pervasive government supervision of the shipbuilding effort encompassed responsibility for safety inspections and compliance with basic government standards for worker health and safety that applied to these construction projects. The government, however, abdicated this responsibility by continuing to expose shipyard workers to undue health risks, even though the government was in a unique position to know of the potential health hazards of asbestos exposure to shipyard workers.

A review of government documents, many of which were classified and not available to the public until recently, illustrates the government's knowledge of the asbestos problem in the war years. The following examples demonstrate the government awareness of the health risks in the shipbuilding effort:

As early as 1941, the Commander in charge of the Navy's Division of Preventive Medicine warned in a letter to the Surgeon General that asbestos control measures at naval shipyards were inadequate. He wrote, "we are having a considerable amount of work done in asbestos and from my observations I am certain we are not protecting the men as we should. This is a matter of official report from several of our Navy yards." [26]

In 1941 and 1942, the Navy sponsored courses at Harvard and Columbia Universities for government industrial hygienists assigned to federal shipyards. The hygienists were informed of the health problems associated with asbestos exposure and discussed various safety precautions to reduce hazards.

Following a government-commissioned survey of 20 shipyards, the Navy and the U.S. Maritime Commission issued, in 1943, "Minimum Requirements for Safety and Industrial Health in Contract Shipyards." The regulations regarding asbestos exposure required that each shipyard appoint a full-time safety director, staff and ventilation supervisor, install ventilation equipment, and provide workers with respiratory protective equipment.

Between 1943 and 1945, the Navy and the Maritime Commission conducted more than 100 surveys of shipyards to determine if the "Minimum Requirements" were being met. The investigation revealed that most shipyards were failing to meet the safety and health requirements. One survey team at a Portland, Oregon, shipyard expressed concern about the potential danger of asbestos and recommended continued measurement of dust levels. Two years later the same team reported in a follow-up survey that "it was evident that no improvements in the [asbestos] shop had been made and the hazard still exists." [27] The United States restricted the disclosure and dissemination of the information obtained during these surveys and prohibited the shipyards from disclosing the information to the workers.

As these examples indicate, the government was more concerned with wartime ship production than with tight enforcement of asbestos safety standards. In fact, at a conference in shipyard safety in 1942, a federal official, after advising conferees of the precautions to take concerning asbestos, added that "above all the last thing we want is to put through any [safety] restrictions that will slow up the shipbuilding process." [28]

(d) *Government participation in the asbestos market.*—The government's dominating influence over the use of asbestos extended to its control over the raw material itself. Through the wartime prioritization and allocation machinery, the government virtually nationalized the asbestos industry.

Just before World War II, the government, realizing the strategic importance of asbestos, began stockpiling raw asbestos fiber, and by 1942 the government had contracted to buy 57,000 tons of fiber.[29] The government sold fiber from these stockpiles, at a profit, to manufacturers. In 1943, the government cut out all middlemen and became an importer of asbestos fibers, making purchases directly from African mining concerns.[30]

---

[26] Memorandum from C.S. Stephenson, Commander in Charge of U.S. Navy's Division of Preventive Medicine, to Admiral R. McIntire, Surgeon General of the Navy (March 11, 1941).

[27] Industrial Health Survey of Williamette Iron & Steel Corporation, Portland, Oregon at 6-7 (March 13, 15, 22, 23, 1945).

[28] See Occupational Health Hazards Compensation Act of 1982, Hearings on H.R. 5735 Before the Subcomm. on Labor Standards of the House Comm. on Labor and Education, 97th Cong., 2d Sess. 254 (1983) [hereinafter cited as "Health Hazards Hearings"] (statement of Victor L. Drexel, Corporate Counsel, Amatex Corp., as part of a panel representing the Asbestos Compensation Coalition).

[29] See Bowles, O., Asbestos, A Materials Survey, Bureau of Mines Information Circular 7880, at 75 (1959).

[30] See United States Department of Interior, Bureau of Mines Minerals Yearbook, 1942: Asbestos (1943).

Once the wartime shipbuilding effort began, the government placed rigid controls on non-military uses of asbestos. First, the asbestos fiber allocation system was established, requiring suppliers to sell their stocks to those companies, including the companies in the shipbuilding industry, with the highest government priorities. By early 1942, the National Defense Commision began issuing conservation orders prohibiting some non-military asbestos use. Ultimately, the federal government directly allocated and scheduled output for all asbestos textile products.[31]

During the wartime shipbuilding effort, tons of the fiber stockpiled by the federal government were sold for use by contractors and subcontractors to make the products to which employees were exposed at shipyards and manufacturing plants. Thus, the federal government was a major source of supply for the disease-producing raw materials.

(e) *Post-war asbestos use.*—Despite the government's knowledge throughout the 1940s of the asbestos problem, the United States continued to require asbestos use in a very large number of its shipboard products until at least 1975.[32] The government continued to purchase and use supplies of asbestos-containing materials throughout the 1970s. For example, deposition testimony reveals that asbestos thermal insulation was still being used at government shipyards as late as March 1977 and the General Services Administration was still purchasing asbestos cloth as late as August 1977.

In addition, the government has continued its role as a stockpiler and supplier of raw asbestos.[33] Over 70,000 tons were released from government stockpiles during the 1970s.[34] As recently as February 1983, the government tried, unsuccessfully, to find a buyer for 9,300 tons of asbestos fiber.[35]

In short, the government was a crucial participant in the asbestos market. Its role was obvious and direct. Indeed, no single actor played a more important role in promoting the development and use of asbestos products than did the federal government, and no single actor bears a heavier burden of responsibility for the tragedy of asbestos-related disease among American workers today.

3. Appropriate Congressional Response.

Significantly, Mr. Chairman, the American people agree that the government should share responsibility for the asbestos tragedy. In a very recent national public opinion survey conducted by Cambridge Reports, Inc., almost eighty percent of those surveyed stated that the government should share the responsibility for compensating workers with asbestos-related injuries as a result of the wartime shipbuilding effort. Forty-four percent said government should share the responsibility with industry, while thirty-five percent said that government should be solely responsible for compensation to injured workers. (The opinion poll is described in a press release attached at the end of this Statement.[36])

Nevertheless, the United States continues to evade its responsibilities to both injured wartime shipyard workers and to its wartime industrial partners. Indeed, the United States—hiding behind the outdated legal doctrine of sovereign immunity—is spending millions of dollars annually to deny its responsibility instead of compensating injured workers.

In a situation like this—where injuries resulted from an enterprise conducted jointly by the United States and private industry to further a national objective—it is fitting for the government to share the responsibility, rather than leaving its industrial partners to bear the entire cost. Congress, therefore, should instruct the government to contribute its share for its dominant role in the asbestos disease legacy of the wartime shipbuilding program.

---

[31] War Production Board Conservation Order M-123—Asbestos Textiles (March 30, 1942) had restricted the sale of asbestos textiles and asbestos-containing packings. These restrictions were combined with Conservation Order M-283 (1943) which placed asbestos textiles under the complete allocation procedure. Bowles, supra note 29, at 75-76, 82-84. See also Health Hazard Hearings, supra note 28, at 253-54 (statement of Victor L. Drexel, Corporate Counsel, Amatex Corp., as part of a panel representing the Asbestos Compensation Coalition).

[32] NAVSEA Instruction 5100.2 (October 24, 1975). Previous Navy directives had been aimed only at the elimination of high asbestos-content thermal insulation materials and at the implementation of industrial hygiene measures. See NAVSHIPS Notice 9390 (February 23, 1971); NAVSHIPS Instruction 5100.26 (February 9, 1971).

[33] According to the Bureau of Mines Minerals Yearbooks, the government asbestos stockpile inventories totaled 121.2 thousand tons in 1965, 58.7 thousand tons in 1975 and 49.8 thousand tons in 1981.

[34] Figures compiled from U.S. Department of Interior, Bureau of Mines Minerals Yearbook Tables 1 and 2 (1974-1980).

[35] See General Services Administration, Federal Property—Resources Service, Solicitation of Offers for Asbestos: Amosite Asbestos—8,537 Short Tons, Crocidolite Asbestos—796 Short Tons, of South African Origin (February 7, 1983). See Isikof, M., "GSA Tried to Sell Thousands of Tons of Asbestos Against Justice Advice," Washington Post, April 4, 1983, at A13.

[36] News Release from the Committee for Equitable Compensation, "National Survey Indicates that Government Should Share Responsibility for Asbestos-Related Injuries" (March 1, 1985).

Such a recognition of government responsibility is consistent with precedent. On many occasions, Congress has enacted legislation to ensure that government provide some or all of the compensation for injuries or damages resulting from industry-government joint enterprises.[37]

In some cases, Congress has agreed to indemnify its industrial partners who had undertaken potentially injurious projects to further government objectives. For example, in the 1976 National Swine Flu Immunization Program Act,[38] Congress provided for government indemnification of manufacturers, distributors and administrators participating in its mandatory vaccination program. Recognizing the government's role in mandating use of the vaccine, the Act made an action against the United States the exclusive remedy for injury or death from the immunization program.

Similarly, in the Price-Anderson Act,[39] Congress imposed limitations on plant operators' liability for nuclear accidents resulting from the operation of federally licensed private nuclear plants, and Congress assumed the responsibility to then take any further action necessary to aid the victims of the nuclear incident.[40] Congress thus recognized that—because of the federal role in encouraging production of nuclear material which was vital to the defense of the country—Congress bears a responsibility to pass further legislation, if needed, to aid any victims.

Congress has in fact stepped in to asssume the government's share of liability where the government played a role in causing an injury, even in the absence of a prior statutory commitment to do so. For example, when a major government project like the Teton Dam in Idaho overflowed, Congress enacted legislation to compensate the victims.[41] Similar compensation was authorized for victims of a disastrous explosion of a shipment of ammonium nitrate fertilizer which was a part of the government's foreign aid program.[42]

In 1982, Congress approved legislation allowing for government payment of economic losses suffered by children's sleepwear manufacturers when the Commerce Department banned the use of Tris, a chemical whose use it had previously required under federal falmmability standards.[43] In passing the Tris legislation, Congress recognized that, by first requiring and then prohibiting use of the chemical, the government was largely responsible for industry's losses.

Most recently, Congress approved legislation that shifts liability from private contractors to the government for harm due to radiation exposure caused by atomic weapons testing programs.[44]

Thus, there is strong precedent for congressional action that would recognize the government's role in the development and use of asbestos and take some measure of responsibility for the tragic consequences of that role. As in these other special "joint ventures" between government and industry, Congress should now instruct the government to bear its fair share of the liability resulting from occupational asbestos exposure.

4. *Potential government savings from participation*

(a) *Litigation cost savings.*—Equity aside, it is in the government's long-term interest to be a participant in an administrative compensation program for asbestos to replace the inefficient tort system. Such a system will actually *save* the government substantial costs arising out of current litigation.

---

[37] Congress has recognized government responsibility in various ways. Until 1946, Congress assumed the obligation of paying for the government's torts by passing thousands of private bills. See Dalehite v. United States, 346 U.S. 15, 25 n.9 (1953). In 1946, to eliminate the clumsy private bill system, Congress enacted the Federal Tort Claims Act, which waived sovereign immunity for certain tort actions against the government. A special waiver of sovereign immunity, which can only be done by Congress, is another means by which Congress recognizes government responsibility for its actions. There have been many such waivers. See Note, Rethinking Sovereign Immunity After Bivens, 57 N.Y.U.L. Rev. 597, 602 n.24 (1982). Furthermore, as discussed below in text, Congress still passes special bills for those situations not covered by the Federal Tort Claims Act, but where Congress finds that the government should assume responsibility for injuries caused by its actions.

[38] Pub. L. No. 94-380, 90 Stat. 1113 (1976).

[39] Pub. L. No. 98-256, 71 Stat. 576 (1957), 42 U.S.C. § 2210.

[40] 42 U.S.C. § 2210(e). See *Duke Power Co.* v. *Carolina Environmental Study Gp., Inc.*, 438 U.S. 59, 86 n. 31 (1978).

[41] Pub. L. No. 94-400, 90 Stat. 1211 (1976).

[42] Texas City Explosion Relief Act, Pub. L. No. 84-378, 69 Sat. 707 (1955).

[43] Pub. L. No. 97-395, 96 Stat. 2001 (1982).

[44] Section 1631 of Pub. L. No. 97-525, 98 Stat. 2646 (1984).

The government spends millions of dollars annually in litigation expenses and, as budget figures indicate, these expenses are increasing as the question of federal responsibility is raised repeatedly in asbestos litigation. Over 40 lawyers and other professionals in the Justice Department and elsewhere in the government are committed full-time to asbestos litigation. In fiscal year 1983, Congress appropriated $5.9 million for asbestos litigation expenses, and, by fiscal year 1985, government asbestos litigation expenses nearly doubled to $10 million. These litigation expenses do not include the costs to the federal judiciary of asbestos litigation, which are estimated at $40 million annually.[45] Nor do these expenses include the $152 million allocated in the Justice Department's original budget justification for fiscal year 1985 to pay asbestos claims where the government is found liable for injury. Therefore, the government is already budgeting around $200 million in fiscal year 1985 to deal with the asbestos health litigation. Further, the government already pays asbestos victims for their injuries indirectly through Social Security, Medicaid, food stamps and other income assistance programs. According to the Urban Institute, depending on how Congress structures the administrative compensation program, such a system could save the government from $19 million to $82 million annually in indirect payments to asbestos victims and their survivors.[46] Participating in a compensation system would save substantial amounts for the government, which could offset a major portion of the government's share of responsibility for funding the system.

(b) *Avoiding risk of enormous federal liability.*—Even more significantly, retaining the present tort system as the means to resolve the asbestos tragedy leaves the government subject to the risk that it will be held liable for enormous tort damages in the years to come.

Several manufacturers, including Raymark, have already filed a number of lawsuits seeking indemnity and contribution from the federal government for amounts already paid. Examination of emerging legal trends will bear out the observation that it is now only a matter of time before the government is found liable for a substantial part of the asbestos disease compensation.

The government's chances of escaping legal liability were greatly diminished by the Supreme Court's 1983 *Lockheed* decision.[47] Where a federal employee sues a product manufacturer, the Court said that the manufacturer may sue the government for contribution or indemnity, even though an action by the injured federal employee directly against the government would be forbidden. This and other principles have now been applied to permit asbestos product manufacturers to seek reimbursement from the federal government at least where asbestos took place during construction on a government-owned vessel.[48]

The government's legal position was further eroded in the *Shuman* case,[49] where the court actually awarded a $145,000 judgment against the government. This case was brought by the survivor of a shipyard worker who had been exposed to asbestos while working at a government-contract shipyard during 1942 and from 1950 to 1953.[50]

Thus, emerging legal trends, as illustrated by the Supreme Court's *Lockheed* decision and the recent *Shuman* case, indicate the government is in danger of being found liable for a substantial part of the asbestos tort costs.

The United States should take heed of this emerging trend. Our company has been dealing with this problem since the early seventies, and I see that the United

---

[45] Storey & Hatch, Compensation for Victims of Asbestos-Related Diseases: Potential Cost Savings for the Federal Government (Urban Institute Research Paper 3269-01, March 1983).

[46] Id. at 4.

[47] *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190 (1983).

[48] See In re All Maine Asbestos Litigation, 581 F. Supp. 963, 975-77 (D. Me. 1984), 589 F. Supp. 1571, 1574-76 (D. Me. 1984); Colombo V. John-Manville Corp., No. 82-0685, [Dec. 7, 1984 issue] Asbestos Lit. Rptr. (Andrews Publications) at 9340, (E.D. Pa. Nov. 19, 1984).

[49] *Shuman v. United States*, No. 78-1407-S, [Aug. 3, 1984 issue] Asbestos Lit. Rptr. (Andrews Publications) at 8776 (D. Mass. July 27, 1984), appeal docketed, No. 84-1884 (Nov. 2, 1984).

[50] In a very recent decision, the U.S. Court of Appeals for the Ninth Circuit held that the United States can be sued for the cancer death of an American serviceman exposed to radiation at Nagasaki, if the government wrongfully failed to warn him of the danger of that exposure after he left the service. *Molbergen v. United States*, No. 84-1626 (9th Cir. April 9, 1985). A similar theory may be applied in the asbestos litigation.

States is now in the position the asbestos manufacturers were in over a decade ago. We saw a handful of cases but we did not realize those cases were really the tip of an enormous iceberg. We were not prepared for the flood of litigation that followed In fact, in recent testimony before the House Judiciary Committee, the head of the Justice Department's Civil Division disclosed that government lawyers are now handling over 2700 asbestos cases, in which individuals and asbestos manufacturers are seeking to have the government pay compensation for over 60,000 claims. He predicted that by 1990, over 200,000 claims for over $38 billion could be pending against the government.[51] The trends in the law are unmistakable and the government risks being subject to multi-billion dollar liability.

Government participation in a compensation program for asbestos, however, would eliminate the increasing risk that the government will be held liable for such substantial tort damage awards. If the government is to avoid the risk of enormous loss, it is in the United States' best long-term financial interest to contribute—along with its industrial partners—to the funding of an administrative compensation program for asbestos.

B. Preventing runaway costs to the Federal Treasury

Mr. Chairman, while the federal government should indeed contribute its fair share to asbestos compensation, it is absolutely essential that any administrative compensation program for asbestos must prevent an undue drain on the Federal Treasury. We must avoid some of the mistakes of the past—which may have produced runaway costs in some federal compensation programs—and we must avoid creating any precedent that could lead to inappropriate federal costs in the future.

First, I must emphasize that the kind of program proposed in the "Asbestos Workers' Recovery Act" would establish no harmful precedent that the United States should contribute to victim-compensation programs generally—because the situation involving asbestos is different from that involving hazardous substances. The pervasive federal involvement in wartime asbestos use is totally different from the general regulatory role the government ordinarily exercises with regard to hazardous substances. This bill would not have the United States bear liability because of any failure to regulate adequately, or on account of any other general governmental function; rather, the government would be made accountable for its own commercial and industrial activities involving asbestos—importation, production, distribution, and use—just as a private company may be held liable for the same kinds of activities.

I also believe it is essential to structure any asbestos compensation program to prevent excessive federal costs. Please consider the following examples of how this could be accomplished:

The amount of the federal contribution to asbestos compensation should be calculated to reflect the actual extent of federal involvement in the asbestos tragedy.[52]

Contributions by private companies and by the federal government should rise if the number of claims rises, so that current expenses of the program can be met without the need for long-term loans from the Treasury.

If budgetary estimates for the program are exceeded, the entire program should automatically sunset, unless Congress acts to bring the program's budget back into balance.

All of these mechanisms to protect the federal Treasury are incorporated in H.R. 1626. Through provisions such as these, I am convinced, Mr. Chairman, that Congress can find a way to accept the government's appropriate share of responsibility for asbestos compensation, while assuring that federal budgetary constraints are not exceeded.

C. Preservation of existing compensation programs

A third point involves the structure of a compensation program. Some legislative proposals have advocated that the responsibility for asbestos should be shifted from existing state workers' compensation agencies to a new federal workers' compensation program to be administered by the federal Labor Department.

However, I do not believe it is time to give up on the existing state workers' compensation system. This proven system, already in place, would provide an efficient mechanism for processing asbestos claims and avoid the need for creating a new and expensive bureaucracy. I therefore urge that any asbestos legislation be carefully drawn, to provide prompt and equitable benefits without undermining the integrity of the workers' compensation system generally.

---

[51] Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 99th Cong., 1st Sess. (March 20, 1985) (statement by Richard K. Willard, Acting Assistant Attorney General, Civil Division, Department of Justice).

[52] As I discussed above, since the United States bears particular responsibility for the operation of the shipbuilding program, and particularly for the asbestos exposure that resulted from shipbuilding, a 50% government contribution is an appropriate initial proposal—corresponding to the approximately 50% of our litigation that arises from wartime shipyard exposure.

To accomplish this, the "Asbestos Workers' Recovery Act" would establish a new asbestos remedy that replaces tort remedies, but that supplements, rather than replaces, existing workers' compensation.

The proposed new asbestos program would rely on existing state and federal workers' compensation agencies to make initial medical and other decisions establishing eligibility for benefits. Any worker who is certified by his compensation board would automatically be entitled to a "supplemental benefit" from the federal fund. Such a system would avoid the creation of a new Labor-Department bureaucracy pre-judging or second-guessing workers' compensation decisions.[53]

Overall, existing compensation systems work rather well, and it seems prudent to build upon this established, working system. However, there are some problems, and, without imposing any federal standards on state programs, the "Asbestos Workers' Recovery Act" would assure that unreasonable procedural or jurisdictional deficiencies in state programs do not interfere with providing a supplemental benefit under a new asbestos compensation program.

If workers' compensation is denied because of some procedural or jurisdictional barrier in the workers' compensation system—such as a statute of limitations or a rule that certain kinds of exposures or diseases are not compensible—the new supplemental program would disregard this barrier and require the Department of Health and Human Services to render an independent decision whether the supplemental benefit should be awarded. An independent federal decision regarding eligibility for the supplemental benefit would also be required if a workers' compensation decision was settled without a determination of eligibility.

Such an approach would undoubtedly have some impact on workers' compensation costs, because more claimants would be encouraged to file for compensation. The "Asbestos Workers' Recovery Act" would also assure that the supplemental benefit provided by the new program would be retained by the claimant, rather than being subject to a workers' compensation "subrogation lien," thus preventing the employer or its insurer from transferring workers' compensation costs to product manufacturers.

As a quid pro quo for these impacts on workers' compensation costs, however, the legislation would end all tort litigation against the employer who used asbestos products, so that no suits would be allowed by either the product manufacturers or the injured employees against the employer.[54] The workers' compensation system was designed to be the principal system for providing compensation for occupational disease, and the "Asbestos Workers' Recovery Act" would assure that this role is retained and strengthened.[55]

---

[53] H.R. 1626 would not establish a federal workers' compensation program, which might best be implemented by the Department of Labor. Rather, the critical federal responsibilities would be nationwide handling of claims and payment of benefits, and consideration of issues on the forefront of medical knowledge—responsibilities for which the Department of Health and Human Services would be best suited.

[54] This concept is endorsed, for example, in the Report of Crum and Forster's Occupational Disease Task Force, in the following terms: There is, however, some merit to proposals requiring that workers' compensation awards paid or payable be deducted from third-party tort awards and that the workers' compensation lien be abolished in return for immunity against direct legal indemnity or contribution proceedings, in products liability cases. The employer is in the best position to provide protection to the worker from exposure in the workplace, because the employer selects the materials and substances that are used in the workplace. Thus, any inequity this provision would create is slight, and the employer would receive the benefit of reinforced immunity from suits by employees.

Role of the State Workers' Compensation System in Compensating Occupational Disease Victims, Report of Crum & Forster's Occupational Disease Task Force 46 (June 1983).

[55] An increased workers' compensation caseload could also have some impact on compensation agency costs, but the legislation would include provisions to help alleviate the burden on state agencies. For example—

The federal government would enter into contracts with state agencies—if they wish—under which the state agencies would handle many functions under the new asbestos compensation program. Payments to the state agencies under these contracts would allow the state agencies to develop enhanced capacity to handle asbestos-related claims generally.

In addition, federal legislation would establish a program of direct grants for state compensation agencies and other organizations, to fund development of pilot programs to improve the handling of asbestos-related occupational disease claims.

All costs of these programs would be paid out of the fund established to pay supplemental compensation, funded by the responsible asbestos parties.

I recommend that eligibility for a supplemental benefit should depend on determinations of eligibility under existing compensation programs, because in my view—which is supported by most people I have spoken to—a new supplemental benefits program for asbestos would pose a risk to existing compensation systems if it established a new federal bureaucracy that prejudged or second-guessed decisions made by state and federal compensation programs. However, this is a matter of judgment and there may be other opinions.

Another alternative to be considered, therefore, would be to replace the tort remedy with a claims-handling mechanism operating totally without regard to the workers' compensation system.

Whatever approach is used, however, I believe that any federal legislation should not displace the existing workers' compenation mechanism. If there are problems in existing workers' compensation programs, such as inadequate benefit levels or unfair technical barriers to recovery, I would certainly support efforts to solve them at the state level.[56] I therefore support the concept of replacing the litigation with a equitable administrative payment, but while leaving workers' compensation intact.

D. Certainty and promptness of insurance availability

Finally, any new program should recognize that all of our liability insurance policies paid for over the past decades should be available to us.

There is already enormous dispute and litigation, as I mentioned earlier, between manufacturers and producers, on the one hand, and our insurance carriers on the other.[57] This complex, lengthy, and costly litigation has had an important impact on some of our companies because, as long as the disputes remain unresolved, we have been unable to collect on some of our policies.

This causes difficulties enough under the present protracted litigation. However, if the new administrative remedy is prompt, as we all intend it should be, any insurance dispute no settled by the legislation could delay a company's ability to collect under its policies—with potentially devastating consequences. How ironic it would be if the legislation succeeded in streamlining the process for resolving employee claims without litigation, but failed in its ultimate mission because insurance litigation made it impossible to obtain the funds promptly enough to pay the needed benefits!

I therefore urge that a reasonable, uniform rule be established to govern how existing insurance would be applied to pay for assessments under the new administrative program. There is no practical or legal reason for hesitation in this regard. The insurers received millions of dollars in premiums as compensation for bearing the tort exposure and litigation expense that the new federal program would eliminate. Furthermore, under the new administrative program, the insurance companies—as much as or more than the asbestos product producers—will enjoy the benefits of reduced litigation expenses and other transaction costs, and the increased predictability of costs. Without a rule such as I suggest, the exposure of the insurance companies would be at least as uncertain and vigorously disputed as it is today. If tort liability were eliminated but rules were not established providing for payment of the asessments out of existing insurance, the insurance companies could reap a windfall of millions of dollars, and the new program might not be affordable by the asbestos product suppliers.[58]

---

[56] See generally Report of Crum & Forster's Occupational Disease Task Force, supra note 54.

[57] In part because asbestos diseases do not become manifest for many years after exposure to the dust, a debate is raging as to when an insurer is responsbile for definding the insured company and paying the award. There are two primary areas of disagreement:

Which policies apply to a particular victim—the ones covering the period of exposure to asbestors, the ones covering the latency period, the ones covering the time the disease became manifest, or all of the above?

What is the extent of coverage under each policy, for a kind of injury that was never anticipated when the policy was written decades ago?

Due to these disputes, some insurers pay nothing under their policies until ordered to do so by a court.

[58] Such an approach is certainly within Congress's authority under the Constitution. In general terms, Congress may make reasonable adjustments to contractual obligations to avoid an unintended windfall or burden and to avoid dispute and litigation. See *City of El Paso* v. *Simmons*, 379 U.S. 497 (1965). One appropriate technique for making such adjustments is for the legislature to refer to a principle of judicial construction, and derive from it a general rule to apply to existing contracts. See *Gelfert* v. *National City Bank of New York*, 313 U.S. 221, 233 (1941).

With regard to insurance contracts in particular, Congress or a legislature may make such reasonable adjustments in the terms of existing insurance arrangements as may be necessary to achieve a compelling general social objective of a legislative program. So, for example, as part of

Continued

It would also be valuable to establish a special judicial tribunal to provide prompt, uniform decisions for any insurance disputes. Such a special-purpose tribunal was established to resolve disputes arising out of the Penn Central reorganization,[59] and the need for such a tribunal may be no less acute here. Indeed, in establishing a new program, it is common practice for Congress to designate a single court to hear disputes under the program.

The "Asbestos Workers' Recovery Act" includes provisions such as I have described that are designed to assure that we are able to call upon all of our insurance policies to provide funding for the new program. I hope that I and other representatives of the asbestos product producers will have the opportunity to work with this Subcommittee—and with the insurance industry—to arrive at a precise and fair definition of the insurance obligation under the new compensation program, and to develop appropriate rules and processes to assure that disputes over insurance coverage do not impede the funding of the program.

CONCLUSION

Mr. Chairman, the task at hand is to assure worthy claimants of prompt, certain and fair compensation and to eliminate the enormous and wasteful costs and inequities of the existing system. The existing situation, which inundates our courts, plagues American business, and imposes unfair burdens on injured workers—while it helps only the lawyers—must end!

By introducing the "Asbestos Workers' Recovery Act," Chairman Murphy, you have taken major steps forward toward reaching a comprehensive solution to this national problem. In the weeks and months ahead, I pledge that I, and others in my company, will offer whatever assistance you and your staff may need to further develop—and ultimately enact—this worthy legislation.

NATIONAL SURVEY INDICATES THAT GOVERNMENT SHOULD SHARE RESPONSIBILITY FOR ASBESTOS-RELATED INJURIES

Washington, D.C., March 1—According to a national public opinion survey conducted by Cambridge Reports, Inc., almost 80 percent of those surveyed believe that the government should share the responsibility for compensating those who suffer from asbestos-related injuries as a result of the World War II war effort. Forty-four percent of that group said that government and industry should share the responsibility, while 35 percent said the government alone should be responsible for compensation to injured workers.

Thirteen percent of the respondents answered that industry should bear the costs of compensation and the remaining nine percent said that other parties should be responsible or did not know who should be responsible.

In response to another question on the Cambridge January Omnibus survey, 75 percent said that industry and government should share the responsibility for environmental, health or safety risks that are associated with national defense. Fifty-two percent of that group said that industry and government should share responsi-

---

New York's no-fault automobile statute, the legislature required carriers to extend the life of existing policies for a certain period. The court upheld this requirement because it was needed to sustain the overall scheme:

> The same public interests which justified the imposition of the entire No-Fault scheme support this aspect of the statutory framework. The law accomplishes a legitimate public goal and any contract right must yield to it.

Country-Wide Ins. Co. v. *Harnett*, 426 F. Supp. 1030, 1035 (S.D.N.Y.) (citation omitted), aff'd mem., 431 U.S. 934 (1977).

Likewise, in *Travelers Ins. Co.* v. *Marshall*, 634 F. 2d 843 (5th Cir. 1981), the court reviewed provisions of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act. The court construed the statute to add a new term of liability to existing policies, but found this approach constitutional on the grounds that it is a "rational method for achieving Congress's goal of compensating those injured in maritime employment . . . ." Id. at 849.

The contemplated asbestos legislation would involve even a lesser alteration of existing contract terms, because the bill would not add on an additional term of liability as did the Longshoremen's amendment, but would instead substitute liability under the new remedy in place of whatever tort liability under the policy would be eliminated. Any extension of coverage under the new legislative framework would also tend to be offset by limits on benefits, reduced litigation expenses, and increased certainty in amount of liability, which the new program would provide. And the purpose of the legislation would certainly be appropriate and compelling—to prevent a windfall for the insurance companies, and to eliminate disputes that may threaten the prompt implementation of an essential compensation program.

[59] See 45 U.S.C. § 719(b) (1976) (establishing special court for Regional Rail Reorganization Act cases).

bility, while 23 percent answered that government alone should be responsible for risks. Seventeen percent thought industry should be responsible. Only eight percent answered that another party should take responsibility or were unsure who should be responsible.

The 1445 people surveyed were representative of the national population by income, age, sex, race, education, political philosophy, urban or rural areas, and region. Cambridge Reports, Inc. is a national research firm in Cambridge, Massachusetts.

Lewis Andrews, executive director of the Committee for Equitable Compensation (CEC), commented on the results of the survey: "We hope that members of Congress will respond to this research by supporting legislation that will assure that government will join with industry to compensate those patriotic workers who now suffer from asbestos injuries."

CEC, an organization of corporations concerned with the asbestos compensation issue, supports Congressional and other efforts to formulate an equitable system of compensation for workers with asbestos-related injuries.

Mr. MURPHY. Thank you very much, Mr. Ross. Your testimony was very well prepared and delivered.

The suits that are pending against your corporation, are they by employees or are they via the product liability route, employees of others? I take it they are employees of the shipbuilding industry.

Mr. ROSS. The vast majority of them are third party suits—we have very few, if any, cases from our own employees—and of those, as I stated in my testimony, about 70 percent come from shipyard workers.

Mr. MURPHY. How much asbestos does your corporation now use each year? I take it you are still using asbestos?

Mr. ROSS. That is correct. I should point out that the products involved in these cases by and large, probably to the extent of 99 percent plus of the third party cases pending against us, are no longer made by our company nor have they been made by our company for many years.

The products that we make today are quite different products. As I pointed out in my introduction, we make friction products, clutch facings, automatic transmission plates, and products of that kind, which are far from the textile products which were used in the shipyards.

I would say in direct answer to your question that of our products today, probably 50 percent of them contain some asbestos but that asbestos is totally encased. These products are composite materials in which the asbestos is used as a reinforcing material primarily, and they are not at all similar to the kinds of products that were used in the shipyards.

I might say this is true of most of the codefendants. Very few of the codefendants make the same products today that are involved in the litigation, which makes for a disproportionate competitive advantage in their current industries, since—looking at our competitors, in particular—we are the only one who has the substantial asbestos overhang and costs that we have. We therefore are at a cost disadvantage to our competition. The economist would say, if there is a cost of doing business such as the cost of paying for asbestos injury or something of that kind, the logical way for an industry to handle that is to pass it along to customers in terms of an economic cost of the product. That can't be done today, because the people with whom we, and other codefendants compete, in new industries are no longer the same group of competitors that existed 40 years ago in shipbuilding.

Mr. **Murphy**. They are not codefendants with you? They are not codefendants but they are not cocompetitors?

Mr. Ross. Right.

Mr. **Murphy**. You heard the objections of Mr. Power to the State comp system. How can we guarantee that each of the claimants, against employer and against third parties, would have a suitable protection of the law in regards to statute of limitations and benefit levels if we go the State compensation route, as compared to a national Department of Labor or longshoremen's comp or some other avenue? How can we guarantee, how far can we go in protecting their right to the claim?

Mr. Ross. I think this issue, which is a real one, because in some States the statute of limitations is totally unreasonable with respect to long latency disease, such as asbestos, and I think the manner in which that issue is handled in the AWRA, the Asbestos Workers Recovery Act, is an effective one in that it will look beyond these issues in states where they exist—where there are anomalous reasons for denying compensation, such as the statute of limitation—and it will recognize those cases and will provide funding for those at the Federal level.

Mr. **Murphy**. OK. Thank you.

Mr. Petri.

Mr. **Petri**. I am glad to have heard your testimony this Congress. I know you have testified in the last Congress, as well.

I am curious if you have any information at all as to what has been done in other countries about asbestos? Do you know at all?

Mr. Ross. Well, my understanding is that other countries do not have the same legal system that we do. We have a system that provides an opportunity for contingent fees, which encourages lawyers to go out and advertise and promote asbestos litigation. We also have a legal system which does not penalize the losing side by having to pay the costs of the winning side. This is an important concept in asbestos litigation.

The problem that we have and the problem that most other codefendants have is not an issue of whether we can win in court or not. We win more cases than we lose. Our problem is that we can't afford to take these cases to court.

If we took to court just the cases that we have in-house today and if we never received another case—and, of course, as I said, we are receiving them at about 550 a month—if we took to court just the cases we have today and we lost none of them, it would cost our company three-quarters of a billion dollars just to defend those cases, without any indemnity whatsoever.

So, obviously, that is a totally unfeasible alternative, as far as we are concerned. It is a little bit like the agent orange situation which the New York Times in a recent editorial referred to as "orange mail", where the settlement of $180 million was made by producers in a case where Judge Weinstein said it was unlikely the plaintiffs could have proved their case in court. And the Times said, and I think properly so, this is a form of blackmail which they nicknamed "Orange Mail."

This is very similar to the situation we have, which I might call "gray mail," in which we can't take the cases to court, either, because even if we win we have to pay our court costs, and this is not true in most other countries. If you win, the opponent has to pay your court costs.

So, there isn't the same kind of a litigous environment in other countries that we have here. I think the third factor is that in certain countries there is a national Federal health program or a national compensation program which, in fact: one, provides for the workers, and two, prohibits any kind of tort recovery such as we have.

No other country in the world has the same kind of a litigation problem that we do.

Mr. Petri. So, people have used asbestos all around the world and are dying from asbestosis all around the world, but the asbestosis compensation crisis is pretty much restricted to the United States, either because they don't have a system of compensation or they handle it through their regular established procedures that usually are not tort type, the way they are in the United States?

Mr. Ross. That is right. They have administrative procedures.

Mr. Petri. It occurs to me, though, that in England a few years ago there was a thalydomide crisis, which is somewhat similar. Here was a product that was used by women and it turned out it caused children to be born with enormous defects, and vast compensation problems ensued.

I guess there is no reason that you should know about it off the top of your head, but I think there may be some instruction there to us in this problem, as to how that was handled there, because I do think the English Government ended up setting up some sort of a program with insurers and with industry and others to set up a program of compensation.

Mr. Ross. England tends to set up administrative mechanisms of that kind that provide for that sort of problem, and that is, as I understand it, basically what they do with asbestos in England, as well, which is what we advocate that we need to do here with asbestos.

Mr. Petri. I would just like to ask you about the Wellington initiative. I think you referred to it in your testimony but didn't dwell on it.

I have the impression that you are interested in it and might participate in it, but are somewhat skeptical about it as a vehicle for actually handling this. Is that correct or is that too pessimistic?

Mr. Ross. Well, I think that is perhaps a brief summary of our view. I think the people who participated in the Wellington did a tremendous job of putting together the program that they did and it is an attempt to address this very serious problem.

For our particular company, we are not a subscriber to Wellington for one specific reason, and that is that we have been through our insurance litigation, or at least through the primary court decision at this point, and it is on appeal, and our primary court decision is more favorable than the insurance settlement that you have to agree to in order to join Wellington.

So, you might say the initiation fee is more than we can afford to pay.

Our claimants would not have the resources to look to in terms of damages nor would our stockholders have the protection, if we were to go into Wellington, that they have on the outside through our insurance settlement.

This is an inherent problem with Wellington, in my view, and that is that there is a stipulated insurance settlement which is imposed across the board on all defendants and all insurance companies. And it seems to me unlikely that a critical mass of matched defendants and insurance companies—that is, defendants who are actually insured by the companies—can be obtained to make this an effective system.

The second problem with Wellington, in my view, is that it is not an exclusive remedy. It allows the litigation to continue and many of the costs that are so overburdensome today will continue. Further, a claimant will have the option of going to Wellington to see what kind of an award he can get there, and if he isn't satisfied he can turn around and go through the tort litigation system. This, I believe, could lead to a scenario which would be much more costly in terms of indemnification than it is today, where claimants and plaintiffs' attorneys find out that by going through Wellington, a certain class of cases is paid more than it is through the court, and another class of cases is paid more through the court than it is through Wellington. I think it could eventually turn out to be costly.

The third point with respect to Wellington is that it does not involve any funding by the Federal Government. Under any consideration of fairness or equity the Federal Government was a fully equal partner and participant in the marketplace, where they bought asbestos and sold asbestos at a profit during the wartime. I see no reason—not on a bailout basis, but on a completely equitable basis—why the Federal Government should not be responsible for a substantial portion of these costs.

So, I think those three things are problems with Wellington, although I feel it is an excellent effort and we support it and we wish them well. But I do not believe it is complete solution to this problem. I don't believe it replaces or eliminates the need for legislation.

Legislation is the only way in which we can bring about these circumstances, which I think are so needed, to give us a real comprehensive and final solution to the problem.

Mr. PETRI. Do you think if the Federal Government were to exercise its option to participate in the Wellington facility that that would be enough of an attraction to make it fly, instead of legislation?

Mr. ROSS. Well, I don't think it would solve the problem, because we would still have the problem where people could go around it to litigation, and you could be exposing the Federal Government, as well as the private parties, to really an unpredictable level of costs.

The way the Asbestos Workers Recovery Act is structured, the costs to the Federal Government are limited by a cap. They are also held under reasonable control by virtue of the fact that there is no litigation system which allows plaintiff's attorneys to escape the system, and therefore that 63 cents on every dollar can go to pay worthy claimants.

It is important that from a societal standpoint we capture that 63 cents. I think that is an absolutely atrocious and unjustifiable transaction expense, and I think our aim, above all, has to be to recapture as much of that 63 cents for claimants as we can, because this industry has limited resources.

As I said, the fourth company has just filed for chapter 11. This game is not going to go on forever, and we have got to use those resources in the best way we can and continue these corporations as viable competitors in their business at the same time. Legislation such as AWRA can do that. I don't think a private solution can.

Mr. **Petri**. Thank you.

Mr. **Murphy**. Thank you very much, Mr. Ross.

I take it, then, to summarize your testimony, if we don't stop the Government from transferring its liability to you, that we are going to cause a transfer of your assets to the lawyers.

Mr. Ross. That is correct, and I think eventually you will transfer the Government's assets to those same lawyers. You might be even more concerned about that.

Mr. **Murphy**. It is costing us $158 million this year for our side of the attorneys' fees.

Mr. Ross. It occurs to me, Mr. Chairman, that the Federal Government is in much the same position that Raymark was about 5 years ago when we had some 2,000 cases before us. We saw some sort of a problem there, but we certainly didn't see the monumental burden that it has become. It is very likely that the same thing is going to happen to the Government, and I think that your farsighted approach, if it is heeded by this Congress in the form of a bill, can very likely be the leadership and the way for the Government to, in fact, avoid this cost.

And rather than being viewed as an expense on the part of the Government, I believe it should be viewed as a deficit control or a deficit reduction program, because you are avoiding what could be very monumental future costs.

Mr. **Murphy**. Thank you very much, Mr. Ross. Your testimony has been very helpful.

Mr. Ross. Thank you, Mr. Chairman. We would be willing to help you any way we can.

Mr. **Murphy**. OK. We will undoubtedly be back in touch with you.

Mr. Charles Coakley, senior counsel for the American Insurance Association.

Attorney Coakley, you may proceed. We lawyers are taking it on the chin today.

STATEMENT OF CHARLES COAKLEY, SENIOR COUNSEL, AMERICAN INSURANCE ASSOCIATION

Mr. **Coakley**. Well, Mr. Chairman, there are lawyers and there are lawyers. I am one of the other kind.

Mr. Chairman and members of the committee, my name is Charles Coakley. I am senior counsel with the American Insurance Association, a property casualty insurance trade association of 174 members.

Our members write approximately 50 percent of the workers compensation insurance business nationwide and thus we have a vital interest in compensation for occupational disease.

It is important to State at the outset that the asbestos problem today is a tort problem, not a workers compensation problem.

Now, I will repeat that again, because it seems to me I have seen a lot of misunderstanding throughout the country where the asbestos problem is raised and it is intertwined with workers compensation.

It is not a workers compensation problem today. Approximately 2 percent of all workers compensation claims are claims for occupationally caused disease. That is all of OD. And that figure has been fairly constant for the past several years.

There are no exact figures as to how much of the 2 percent is due to asbestos exposure but the best estimate is that approximately one-quarter of the 2 percent, which is one-half of 1 percent, are asbestos cases.

Most of the asbestos tort cases are based on exposure in the workplace. You have heard that from the previous speakers this afternoon, and that is based on our experience, as well. Yet there are very few workers compensation claims filed compared to the great volume of tort suits. No one knows for sure why this is so.

Prof. Peter Barth, who is a nationally known expert on occupational disease—he is a professor of economics at the University of Connecticut—states that he believes the main reason few workers compensation claims were filed is employees' ignorance either of the source of the disease or of their legal right to workers compensation benefits.

Professor Barth predicts that as ignorance dissipates more claims will be filed.

There are others who feel that there are many tort cases where there is no true disability which would be compensated by workers compensation, such as a spot on the lung or a plural thickening, which does not disable the worker at the time that he files his tort suit.

Still others believe that plaintiffs' attorneys are bypassing the compensation system because the rewards in tort are greater.

There is at present a study underway by the Workers Compensation Research Institute which should shed some light on this problem. That is a fairly recent—by recent, in the past 2 to 3 years—institute which has been set up in Cambridge, MA, to deal only with workers compensation issues, and it has on its board of directors insurance companies as well as self-insured companies, and from time to time it is expected that labor would be involved when there are projects that they would be interested in.

This is one of the first projects that they are undertaking, why are cases not being filed in the workers compensation system that clearly should be filed in the workers compensation system, since the allegation in the tort cases are that the exposure arose at the workplace.

What is not true is the often repeated statement that the workers compensation system is inadequate for the job and thus workers are driven to the tort system.

All States provide unlimited medical benefits in their workers compensation system. Not $1 in medical cost is paid by workers.

There is no program that I know of with accident and health insurance, Blue Cross, any of those, where there is not some kind of deductible or a maximum amount of benefits provided. All States have unlimited medical benefits for occupational disease as well as any other workers compensation case.

Weekly indemnity benefits and death benefits are adequate in the majority of States. And it is true that there are a few States where benefits are low, and these are always referred to and held up as though they were the norm. But they are not typical of the country as a whole.

In fact, regardless of the level of benefits, it pays to file a workers compensation claim at the same time that a tort suit is filed. The outcome of the tort suit is uncertain. You just heard the previous speaker say that he wins most of the tort claims. But if the worker prevails in his compensation claim, he will receive weekly benefits and have his medical care paid while he is waiting for the result of his tort case.

Another misconception is that it is almost impossible to obtain workers compensation benefits and so workers give up and file tort suits instead.

It is true that many occupational disease claims are initially controverted by employers and insurers. The very nature of occupational disease, multiple causations, different opinions by doctors, and other factors, make these claims more difficult to deal with than the typical traumatic injury.

Nonetheless, most of the asbestos claims filed are eventually paid.

Professor Barth states that where a decision was reached, benefit awards were made in 89 percent of the cases filed.

One also frequently hears that States have restrictive statutes of limitations which require that compensation claims be filed within a certain time after the last exposure and that this time elapses before the workers are disabled.

This is somewhat of a catch-22 situation in that in legal lingo the statute has run before the cause of action accrued.

There are these restrictive statutes and they exist in a small number of States, about 16, and there is activity in some of these States to change their statutes.

In the past 2 to 3 years, Illinois and Maine have legislated a 25-year statute of limitations for asbestos related disease, and Montana has passed a nonrestrictive statute for all occupational disease.

Last year New York codified its case law and enacted a nonrestrictive statute for all occupational disease.

The restrictive statute of limitations is not a great problem. If it were, there would be a small number of cases in those States and a large number in the nonrestrictive States. This is not the situation. There is no appreciable difference between the groups.

For example, the U.S. Longshore Act has high benefits, a liberal administration and an unrestrictive statute of limitation. Yet there is not an excessive number of occupational disease cases in the longshore system, a system which has jurisdiction over shipyard workers exposed to asbestos.

Claims people who deal with these cases every day report that the typical claim involves a worker who has been exposed for years to a substance. As he gets older he becomes more and more unable to work and finally ceases to work. At that point a claim is filed, if it is filed at all. In such an instance, the statute of limitation, restrictive or not, makes no difference. The disability occurred soon after the last exposure and the claim was timely.

The American Insurance Association believes that the State workers compensation system is, on the whole, functioning well and should be preserved.

Where the State system needs improvements, we are seeking legislative and administrative reform. We are working to abolish restrictive statutes in those States that still have them, and are embarking on a program to improve State administration, where necessary.

Our association has endorsed the report of the Crum and Forster Occupational Disease Task Force. Crum & Forster Insurance Co. is one of our members.

That report recommends:

One, the exclusive remedy of workers compensation should be preserved. Third-party suits should be permitted but the workers compensation lien should be eliminated, the amount of compensation paid be deducted from the tort award, and no action for contribution or indemnity be permitted against the employer by the third party. Suits by the worker against coworkers, employers or insurers should be prohibited.

Two, restrictive statutes of limitations should be abolished.

Three, the employer, and its insurer, who last exposed the worker to the injurious substance should be wholly liable for all workers compensation benefits, without recourse to apportionment amongst other employers or insurers.

Four, benefits payable at the time of disability should reflect current levels of benefits, not those in effect at the time of last exposure.

There are a few claimants, very few, who last worked some years ago in exposure and then went, for whatever reason, to another job where there was no exposure to whatever it is that causes their disease. Some years later, in some cases 10 to 15 years—this is typical of asbestos cases—where after exposure the disability arises.

In a nonrestrictive statute of limitations State, which most States have, these cases would be compensible. And what I mean by current benefits is we do not go back to the level of benefits in effect when this worker was last exposed. We take the benefits that are payable today.

So that if the worker back 10 or 15 years ago, his salary or wages at that time would have been sufficient to give him the maximum benefit then, he gets the maximum benefit today. If his wages were insufficient and he would have received some percentage of that maximum benefit years ago, he would get that percentage of the maximum benefit today.

It is absolutely ridiculous to say, yes, we will pay these claims, we will give someone $45 a week in 1985 to live on.

Five, workers compensation should be the primary source of benefits for occupational disease, except for those receiving retirement benefits.

Six, full benefits should be paid for a condition resulting from both work related and nonwork related causes, if the work related factor was a major cause of the condition.

Seven, the determination of compensability and extent of disability is inherently complex and controversial in occupational disease claims. Therefore, administrative standards should be developed to facilitate prompt, efficient and equitable processing of claims. These standards are particularly necessary for medical guidelines and procedures for determining compensability.

In closing, we would like to say that whatever problems exist in the States should be remedied at the State level. Our association is committed to that course.

We must all understand that the tort problem cannot be alleviated by abolishing the workers compensation exclusive remedy or by any other drastic change to the current State system.

Even if the State systems were abolished and a Federal occupational disease law took their place, the number of tort suits would not diminish.

Whether there will be more workers compensation claims for occupational disease, only time will tell. If there are, the State systems will accommodate them.

Thank you, Mr. Chairman. I will be happy to answer any questions.

Mr. **Murphy**. Thank you very much, Mr. Coakley.

Do I understand you correctly that you indicated that even though we would have a system of compensation, you would continue to allow third party suits, and I take it that is against the manufacturers?

Mr. **Coakley**. That is correct. We haven't taken a position, our association has not taken an up or down position on your bill. We have some serious problems with a few of the features of it, namely, how the assessment is going to work. But the present third-party system, if you incorporate in it the recommendation that we have, which is that the amount of workers compensation paid be subtracted from the judgments, as at the present time the amount of compensation paid is a lien upon the award. And although the worker doesn't get it, it passes from the product manufacturer to the employer or worker compensation insurer.

What we are saying is you eliminate that lien, the employer, the insurer doesn't get anything. What you would do is subtract that, what would be the lien, from the product judgment, so that the product manufacturer pays less. Today the product manufacturers have a rather good point when they say—it is a typical case—look, I made a good machine 40 years ago, I haven't seen it since, the employer took the guard off, he redesigned it, he did all sorts of things, and the employee cuts his hand off and sues me, I didn't do anything, I made a good machine.

If you subtract the amount of workers compensation paid from the judgment, then there is a benefit to the product manufacturer.

Mr. **Murphy**. Would you then insist that the employee go through the compensation process first, so that you could properly establish the offset?

Mr. **Coakley**. Yes, you would. And except for occupational disease, most people that have their hand cut off on the machines are in the compensation system. Automobile accidents are the same way, where you might sue the manufacturer of the car for faulty brakes or a gas tank that exploded. These cases routinely go through the compensation system.

Why asbestos, in particular, and perhaps other occupational disease cases do not go through the compensation system, no one knows. There is speculation, as I indicated, but there is no real knowledge.

Peter Barth said they don't know about the compensation system. Other people say that they have no real disability in that they may have a spot on their lung but they are still working, so they don't go to the compensation system because they wouldn't get anything because they have no wage loss, no real disability. But you don't know, we don't know.

But in this three point program—perhaps it is easier to illustrate by taking a hypothetical case.

Let's assume there is a third-party case where there is a judgment of $100,000. There was $20,000 in compensation paid.

Today, in all but two States, that $20,000 is deducted from the $100,000 and goes to the employer or insurance carrier. So, the worker winds up with $80,000.

Under this system, the $20,000 would be subtracted from the product judgment, so that the product manufacturer pays only $80,000. The worker is still in the same position. He gets the $80,000. But there is no lien by the employer.

Now, to make this equitable, you don't allow the product manufacturer to implead the employer for contribution or indemnity, and that is done now in three States, New York, Illinois, and to a certain extent in Minnesota, where the product manufacturer can come back against the employer and get an apportionment of the judgment.

So, for example, where in this $100,000 hypothetical there might be a judgment in the three States that the employer contributed 50 percent, so here is the employer now paying out $50,000 to the third-party product manufacturer. Now, that is the way it works in those particular States. That would be prohibited under this provision that we have here. Everyone benefits.

The worker is in the same position as he is today, no change.

Mr. **Murphy**. You would in your proposal eliminate the requirement or open the statute of limitations.

Mr. **Coakley**. Well, you would eliminate the restrictive statutes, yes.

Mr. **Murphy**. Eliminate the restrictive statutes.

Mr. **Coakley**. Yes, of course. They are inherently unfair. They are simply saying that the statute of limitation has run before the cause of action accrued. It is a catch-22 thing.

Now, again, this arises in a very small number of cases, because the usual thing is that the person works for many years in the substance and gets sick and then files the claim.

So, even in these restrictive States you don't have a large problem today. But to the extent that there are even one or two people who should be compensated and are not because of a restrictive statute, that is not right and it shouldn't continue. There is a small number of States that still have these restrictions. Most do not.

Mr. **Murphy**. OK. Thank you.

Mr. Bartlett, do you have questions?

Mr. **Bartlett**. Yes, Mr. Chairman, I do.

Mr. Coakley, I apologize for coming in and out of your testimony. One of the worst things about Congress is that you are called upon to do about six different things at the same time. But this is a terribly important issue to a lot of ex-workers, claimants, and victims of asbestos, as well as terribly important to the shareholders and to the lenders and employees of your companies, as well as to the manufacturers. So, it affects a lot of people, and depending on legislation that may or may not be reported out of this committee, it could have a tremendous effect on American taxpayers also.

Let me begin with this question, and I wonder if you could take your testimony and sort of reduce it down to what I think I heard you say, and gathered from a quick review of your written testimony: That with a few nibblings around the edges of the compensation system, would you then generally endorse continuation of the present tort system of third-party liability that we have now? Or would you make any sort of a fundamental change in that at all?

Mr. **Coakley**. Well, I do believe personally that, as was described earlier, the present system can't continue where you have every case litigated, because it will bankrupt the system. Companies just cannot pay these kinds of judgments, and even, as you heard, if they win all their cases they still have enormous defense costs.

So, I think that something, perhaps the Wellington group, some sort of overlay of the workers compensation system or another type of an arbitration system, or something that Chairman Murphy has outlined in his bill, probably has to be put into place if we are going to have any kind of sanity in the tort system.

But what I am saying is that whatever the solution is in the tort system doesn't have to and should not change the present State system of workers compensation. We do not support the AFL–CIO's position that you heard earlier, that there should be a Federal workers compensation or a Federal occupational disease law or a Federal asbestos law, as far as workers compensation is concerned, because to the extent that there are some problems with statutes of limitations, a lack of guidelines for developing—whether the person has asbestosis or something else and is it related to the job, there should be a medical panel set up in the various States to lay down guidelines for these things.

That is something that should be done. The workers compensation system is not perfect, and we are advocating that those reforms be made. But what we are saying is don't throw the baby out with the bathwater, don't go to a system where, as has been proposed in some places, where one can ignore the compensation system and simply sue the employer for what amounts to simple negligence.

We have that in a few States or we had it in some States. It has recently arisen in Ohio. It was in West Virginia, it was in California. And in both California and West Virginia, legislation overturned it. Ohio's decision is fairly recent, at the end of last year.

But in effect, the decision simply takes a willful act and makes a willful act really negligence.

Now, obviously there should be no compensation—the compensation system does not apply where there is a true willful act, where the employer actually intends to harm the employee, willfully knows that this employee is working with something that is highly dangerous, refuses to tell him anything about it, gives him no safety devices, no masks, whatever else, no question but that employer should not be able to hide behind the exclusive remedy.

But that doesn't mean that the employer should pay workers comp and be allowed to be sued by the employee. It is either one or the other.

If it is compensible, we have a no fault system. If it is a willful act, then we are outside the no fault system and then obviously the employee can sue the employer.

An extreme example is the foreman who comes onto the job and pulls out a gun and shoots the coworker because he has been fooling around with his wife. That is clearly not a compensable claim and should not be.

I think that distinction is important to make.

Mr. **Bartlett**. Mr. Coakley, let me see if I can then take from that and interpret: You support generally what we are doing now, which is both? Doesn't the present system permit or encourage pursuit through both the compensation system and also the tort system? Isn't that the basic problem?

Mr. **Coakley**. The basic problem is that if—well, the tort system——

Mr. **Bartlett**. It is hard to say what the basic problem is, but isn't that one of the——

Mr **Coakley**. Well, the basic problem is the problem with the tort system, delay, excessive attorney's fees on both sides which eat up whatever there might be in the way of judgments.

Mr. **Bartlett**. So, what type of system would you suggest?

Mr. **Coakley**. Well, there again we would say, not having taken a position on the bill, Chairman Murphy's bill, that the Wellington group, parts of the chairman's bill that have this national overlay, this fund on top of the existing workers compensation system, or some kind of arbitration, which is part of the Wellington group, where you would have perhaps compulsory arbitration, so that you could move these cases through rather rapidly, and possibly you might have to have restrictions upon the judgments allowed, limits on the judgments allowed in exchange for a rather quick, rapid system without all the panoply of legal technicalities that we have today, with testimony and expert witnesses and all the rest of it, which just is too costly. It can't be sustained.

Mr. **Bartlett**. That sounds remarkably similar at least to some aspects of Chairman Murphy's bill.

Mr. **Coakley**. Yes, in some aspects. As I said, the assessment part of the chairman's bill is totally unacceptable to us. How this thing is going to be funded and whether politically one can get the Federal Government to fund 50 percent of it or not, I don't know.

The assessment provision, for example, states that all of the asbestos defendants are to get together, and I don't know if you could find a room big enough to get them all in, but they all have to get——

Mr. **Bartlett**. They did in San Francisco.

Mr. **Coakley**. Get them all in, and then they will determine amongst themselves what percentage of assessment each of them is going to pay of the amount of money needed.

Mr. **Bartlett**. Well, perhaps——

Mr. **Coakley**. But I am not finished. Now, when they are through deciding that, that decision is binding on their insurers. So, it is like I say to you, Congressman Bartlett, go out and have a $100 dinner and I will pay for it. That is the problem that we have, the defendants themselves would, in effect, be determining the amount of money that insurers would pay. That is a problem with the bill.

It may be that after we look the thing over and consider it with our committees and our companies that we might have a favorable opinion of some part of it. We are not prepared today to state that we are supporting a part of the bill, or that we are opposed to the bill on the whole, except as I just mentioned for the assessment part.

But I would agree, and I think all of us that have spoken this afternoon are in agreement that the present tort system has to have some kind of a change to it, at least for these asbestos cases, possibly for any others that may arise in the future that are like this.

Mr. **Bartlett**. How would you construct the assessment system? Would you construct a system in the legislation or would you just simply assess by legislative——

Mr. **Coakley**. Well, you could do it, depending on how much money was needed, I suppose, and whether you got the Federal Government into it. You could do it by market share, perhaps. You might do it by number of lawsuits filed against defendants on a proportional basis.

But the present scheme as outlined in the bill may have constitutional problems. I don't claim to be a constitutional scholar but I think that there are some difficulties with that form of assessment.

Mr. **Bartlett**. Do you believe that there is any culpability on behalf of the Federal Government to bear liability to employers for asbestos exposure, and if so, how would you arrive at that?

I said earlier with another witness, and you may have been there, that it seems to me to be two issues. One is who pays and the second one is what system for claims do we use.

How would you judge who should pay with regard to the Federal Government?

Mr. **Coakley**. Well, I think I will pass on that because we don't insure the Federal Government. And to the extent that the Federal Government——

Mr. **Bartlett**. We all do.

Mr. **Coakley**. Well, our companies don't issue policies on them. To the extent that, obviously, if the Government pays, then moneys paid out by individual insurers would be less. I don't imagine that we would object to that.

The way things are going, though, if there is no change made, it won't make any difference, because however policy limits are defined, it will all be paid out to the last penny and there still will be more tort suits coming on line.

Mr. **Bartlett**. OK. If Congress were to do nothing at all, what would the likely result be with regard to, first, victims, second, manufacturers, the third-party manufacturers, and third, insurance companies that have insured those manufacturers?

Mr. **Coakley**. Well, you are talking really now about two things, about workers compensation and liability.

Mr. **Bartlett**. With regard to liability.

Mr. **Coakley**. And really, I think so far the asbestos is the only problem that has arisen of the magnitude of asbestos. There are other cases, other types of injuries that have come along where tort suits have been filed, but they are kind of small compared to the asbestos cases.

And unless some new catastrophic product comes along which gives everyone cancer—for example, we all use ballpoint pens. If 5 years from now everyone starts to get cancer on their fingers and hands and it is attributed to ballpoint pens, that would be worse than asbestos because it would sweep through the entire industry.

But if we can assume, at least for the present, and your crystal ball is as good as mine, that the asbestos problem is unique and that it is on its way down in the long term because less of it is being used, there are many more precautions being taken with it today than ever were taken before, masks, workers know what the problems are with it, State laws, all kinds of OSHA regulations, and State OSHA, that mandate all of these safety devices.

Just in New York, for example, in the past 4 to 5 years there has been a decline in worker compensation asbestos cases, which had been fairly steady over the past several years. And again, you can't say for sure, but a reasonable supposition is that less usage, more information, better protection is resulting in fewer claims.

So that if the number of tort suits—and again we are using a crystal ball—were to decline over the years—because, after all, the shipyard population which was referred to are now—the youngest one has got to be 60 years of age, and you would assume that if they were last exposed in 1945 and they haven't gotten it yet, they probably won't.

So that, again, I would imagine that there would be fewer of these cases coming along in tort over the next several years.

So, maybe all one has to do is address the asbestos problem in this manner, perhaps as the chairman's bill indicates, perhaps as Wellington is attempting to do, or something along the lines of Wellington where both sides would agree to arbitration, or perhaps a statute that compelled arbitration for asbestos tort suits.

Mr. **Bartlett**. What happens to each of the parties if Congress does nothing at all?

Mr. **Coakley**. Well, as I said, the nonasbestos parties probably aren't going to be any worse off. More asbestos companies will go into chapter 11, if things just continue and if the volume of tort claims continues to stay the same or to rise.

If enough of them can withstand it over the years, if Congress does nothing or if nothing happens on a voluntary basis—but I think that, in some situations it almost always has to get worse before it gets better, because everyone's attention is focused on it. And I think that both sides—if the plaintiffs' bar believes that the well is going to run dry and that there will be no more insurance money left and that the defendants will all go to chapter 11, that there would be more interest on their part to be in favor of, to support some sort of these systems that we are talking about, where you remove the tort system and have some sort of very fast compensation, perhaps with limits.

Now, again, I don't know whether your legislation would be successful. I would imagine and I would expect that the trial bar will oppose your bill, Mr. Chairman, vociferously because it removes the right to sue in asbestos cases.

I can't imagine them being quiet for that. On the other hand, if there is no money to be made in asbestos cases, they might like your bill after a while.

Mr. **Murphy**. I have just one question, if I might. You have indicated a preference for going the State compensation route.

Mr. **Coakley**. That is correct.

Mr. **Murphy**. Why not allow the shipworkers to go the longshoremen's compensation route? They were at that time shipworkers. And why not have those who were nonshipworkers but exposed to asbestos go the State compensation route, and the shipworkers, which are, I understand, about 50 percent of the claims, go the longshoremen's route? Do you have a thought on that?

Mr. **Coakley**. Yes. That is a historical feature of—back in 1929 when they enacted the Longshore Act, the reason it was enacted was because many States were throwing these cases out, saying that they have no jurisdiction.

Mr. **Murphy**. Jurisdictional problems.

Mr. **Coakley**. No jurisdiction. So, that is why Congress enacted the Longshore Act, to cover that gap that was left by the States.

So that the Longshore Act applies, in all States where there are navigable waters and it is a very generous program, and most of these, if not all of the shipyard workers, unless they were Government employees—I understand some of them were during World War II—should have filed their claim, should have been in the longshore system.

Yet, although there are cases in the longshore system and I don't mean to indicate there are not, you don't find that every shipyard worker who has a tort suit ever went to the longshore system.

So that it is strictly jurisdictional. In fact, as you probably remember, the Longshore Act used to apply here in the district, up until a couple of years ago when it was changed and the District put in their own workers compensation law because of problems with, well, the way it was administered—not so much the way it was administered, I guess, but the high cost and perhaps the benefits that were mistakenly being paid.

Mr. **Murphy**. OK. Thank you very much, Mr. Coakley.

Are you finished?

Mr. **Bartlett**. Mr. Chairman, if I might ask another question.

Mr. **Murphy**. Mr. Bartlett.

BEST COPY AVAILABLE

Mr. **Bartlett**. I was about to ask you another broad question: If you were constructing Federal legislation, how would you construct it, but I am going to withhold that question because——

Mr. **Coakley**. Thank goodness, Congressman.

Mr. **Bartlett**. You are not prepared for that. But if you were constructing Federal legislation, what elements of the legislation would you include to avoid the pitfalls that we have had of the seemingly endless Federal costs for the Black Lung Program?

Mr. **Coakley**. Well, that is the problem. That is one of the reasons that we want to maintain the current State workers compensation system, because we all have nightmares about having a Federal OD act that would be as expensive as the Black Lung Act. It was much more before the 1981 amendments, and still runs over $2 billion a year. And the Longshore Act, before the most recent amendments, was very, very costly, which led—the district to put in their own workers comp statute, because it wasn't just longshoremen, everybody working in the district, except the Federal employees, were covered under the Longshore Act and it was a very, very high cost for employers.

What could tend to happen, and past history certainly with the Black Lung Act, where presumptions were included in the law wound up costing very, very excessively, because what you have, instead of a disease as we know it, you have a legal disease, where in the black lung law if a worker worked in the coal mines for so many years, he was presumed to have the disease.

Now, it is very difficult, although theoretically you can rebut that presumption, it is pretty difficult to do so.

And there was a study done by the Department of Labor which found that a very small percentage of the people being paid for black lung actually had medical total disability. What they had was a legal disease. The statute said you are disabled because you worked in a coal mine.

In their presentation the AFL-CIO indicated that they were very favorably inclined toward presumptions as a way of getting around the problems of does a person have asbestosis or silicosis or not.

What we are saying is, instead of litigating these cases, there should be medical guidelines laid down.

We would certainly be in favor, instead of presumptions, of a medical panel, for example, set up composed of the best doctors—and I don't mean doctors who testify for insurance companies, I don't mean doctors who testify for plaintiffs, and everyone knows who they are. If you have ever practiced law, you know you can find a doctor that will say what you want him to say. I did, and I can find you a doctor that will testify that a corpse in a coffin could get up and dance if only he were motivated.

So that if you have the best doctors calling the shots, and this is the case in North Carolina—the system down there works rather well. They use Duke University doctors.

Refer these claimants out to the impartial doctors, the insurer will pay for it, get them examined, x rayed, whatever it is that they need, and let those doctors call the shots. If they are disabled, we will pay. If it is related, we will pay. If they are not, we won't.

That is much more preferable than bringing in a doctor on each case, one of whom says the worker is about to die, the other of whom says there is nothing wrong with him, and we know both are liars. That kind of a system is very costly and should be avoided.

Mr. **Bartlett**. So, the chief way that you would avoid the black lung open-ended checkbook would be to avoid presumptions or——

Mr. **Coakley**. Yes, avoid presumptions and set up genuine impartial doctors.

Mr. **Bartlett**. Will that work?

Mr. **Coakley**. Sure, it will work. It works in a number of places. Peter Barth, whom I referred to in my testimony, has just completed a study for the Workers Comp Research Institute on the effectiveness of medical panels. They are only in about six States or so.

I will give you my own experience in New York, where you don't get it as a matter of right and it is only done at the instance of the compensation board. It is strictly up to them to decide whether to refer a case out to the panel.

But they get good doctors, professors, who were known not to be testifiers for one side or for another side, and that was it.

You could bring the doctors in, you could cross-examine from now until next week, but unless you could show that they had misread a hospital record or just make some egregious mistake, their opinion stuck. We will go with that system. It is much more preferable to litigation.

Mr. **Bartlett**. Thank you, Mr. Chairman.

Thank you, Mr. Coakley.

Mr. **Murphy**. Thank you very much, Mr. Coakley. We may call on you for some advice. May we give your office a call and schedule a meeting sometime with us?

Mr. **Coakley**. Any time.

Mr. **Murphy**. Thank you.

We have the testimony of Mr. Edward Shea. Is Mr. Shea here?

We had expected to finish today at 3, Mr. Shea, so if you could summarize your testimony, we would certainly appreciate it.

Mr. **Shea**. I am prepared to do that, Mr. Chairman.

Mr. **Murphy**. Thank you, Mr. Shea. You may proceed.

STATEMENT OF EDWARD E. SHEA, SENIOR VICE PRESIDENT, GENERAL COUNSEL AND SECRETARY, GAF CORP.

Mr. **Shea**. Mr. Chairman, I am Edward Shea. I am a senior vice president, general counsel, and a director of GAF Corp., and with me is Paul Zevnik, who is a partner of the law firm of Paul, Hastings, Janofsky & Walker, our counsel in the asbestos litigations with the Federal Government and in other cases.

GAF, briefly, is a large publicly owned company. We manufacture specialty chemicals and building materials. We have 4,000 employees and we have manufacturing operations in 15 plants located throughout the United States.

I would like to ask that the written remarks which we have submitted to you be made part of the record, together with the verbal remarks.

Mr. **Murphy**. Without objection, your entire testimony is being accepted into the record and will be placed there.

[The prepared statement of Edward E. Shea follows:]

PREPARED STATEMENT OF EDWARD E. SHEA, SENIOR VICE PRESIDENT, GAF CORP.

On behalf of GAF Corporation, this is to thank the Committee for the opportunity to address H.R. 1626. At the outset, GAF is pleased with the Committee's considerable strides in coming to grips with the issue of a fair and workable system for dealing with asbestos-related disease. H.R. 1626 represents, in GAF's view, a significant improvement over earlier asbestos compensation proposals. To be sure, there are major issues that remain to be addressed, and numerous minor areas in which H.R. 1626 could be improved. GAF will identify in this testimony a few of the areas in which constructive advances could be made, and offers to work with the Committee and Committee staff with respect to H.R. 1626. Here, however, GAF will emphasize the most important areas in which this proposed legislation marks a step forward in approaching asbestos-related disease.

A. THE OBLIGATIONS OF THE UNITED STATES

GAF believes that H.R. 1626 properly recognizes the role of the United States in creating and causing asbestos-related disease. GAF agrees that "[a]t least one-half of those individuals now suffering from asbestos-related diseases were exposed while employed directly by the Federal Government, or in federally controlled shipyards." 131 Cong. Rec. E 990 (March 20, 1985) (emphasis supplied). Unquestionably, the United States bears substantial responsibility for asbestos-related disease, and any asbestos compensation system must provide for a 50% or more Federal funding responsibility in order to be equitable and to provide fair compensation to affected individuals. GAF thus strongly supports the provisions of H.R. 1626 mandating a 50% Federal Government funding responsibility.

The Committee has identified some of the factors supporting this result. GAF offers to work with the Committee in providing further support for this portion of the legislative proposal. GAF reminds the Committee that asbestos was once considered an important material to the defense of our nation. Indeed, Congress itself determined that asbestos was one of this nation's strategic materials essential to our national defense, and in fact passed various pieces of legislation, including the Defense Production Act of 1950, which were intended to promote and encourage asbestos mining and manufacture. In accordance with the mandate of Congress and an order to serve the nation's defense, GAF supplied asbestos in response to Government requirements and specifications. GAF feels, therefore, that Congress should properly address a situation in large part resulting from a patriotic response to Government requirements and legislative mandates.

GAF also supports the Committee's conclusion that many workers were exposed to quantities of asbestos while employed by, and at the facilities of the United States Government and its contracting agents. There is also abundant evidence that the United States and its contracting agents maintained unhealthful workplace environments at these facilities, despite their early knowledge of the potential hazards of asbestos when used improperly.

Furthermore, in the late 1940s, the United States Government sold GAF, and perhaps others, thousands of tons of amosite asbestos for inclusion in products which the Government required for use in its shipyards and other facilities and its contract shipyards. This Government asbestos was sufficient to supply a GAF insulation plant—a plant established at the Government's request—with amosite asbestos for several years.

In addition, GAF's situation is unique in that during the early 1950s the United States Government requested GAF to explore and develop additional domestic asbestos reserves. The Federal Government even provided substantial funding and support, pursuant to a written agreement, as part of these efforts to increase domestic supplies of asbestos, all pursuant to the Defense Production Act of 1950.

The Government was an enthusiastic promoter of the use of asbestos and asbestos-containing materials, because of the unique properties of asbestos and asbestos-containing materials, especially fire retardant and insulating characteristics key to national defense. For example, the United States Navy required that products used in outfitting its ships contain large amounts of numerically-specified quantities of asbestos, and refused to approve non-asbestos substitutes long after the Navy knew asbestos was a public health concern for its and other workers.

GAF believes, as does this Committee, that the United States is, and should be held, responsible for asbestos-related health claims. GAF has presented its claims to the United States, for reimbursement of amounts it has paid in cases where workers were exposed while employed directly by the Federal Government, or in Federally-controlled shipyards. The Government has so far failed to reimburse GAF for its expenses. GAF has also been forced to sue the United States, and to incur significant legal costs, in order to seek reimbursement from the United States. Accordingly, GAF believes that the responsibilities of the United States must be recognized, as would be accomplished by H.R. 1626.

B. INSURANCE COVERAGE CONTROVERSIES

Together with the issue of a fair Federal Government contribution, the largest stumbling block in the asbestos compensation area has been the resolution of insurance coverage disputes. All asbestos manufacturers were, and are, to a greater or lesser extent insured by private insurance, which provides for substantial defense and indemnification. GAF believes that many policies have not yet been located by a number of affected companies. GAF and its predecessors were, and are, responsible companies that obtained substantial amounts of general comprehensive liability insurance and workers' compensation insurance. GAF and its predecessors paid for this insurance in order to cover the very type of unanticipated liabilities raised by the asbestos health claims.

GAF does not believe there ever should have been any question raised by insurance carriers concerning their contractual duties fully to defend and indemnify GAF. However, the insurers chose to deny the existence of policies and also denied coverage on a multiplicity of theories.

Through diligent work and good record-keeping, GAF has documented policies for several decades which provide for comprehensive general liability and workers' compensation coverage. Assembling records to document this coverage has been a time-consuming and expensive effort. However, GAF believes that the insurance coverage it purchased over the years, and which it has located, will permit it to provide asbestos health victims with compensation where appropriate—if GAF is successful in its litigation with its primary and excess insurance carriers. GAF further believes that a significant amount of such insurance coverage exists for other affected employers, manufacturers and distributors.

GAF is in a better position than most, if not all, manufacturers. It has located it policies; it has pursued its contractual rights vigorously; and some of its carriers have been supportive. Yet, GAF has expended major effort and substantial monetary resources, to date millions of dollars, just to enforce policies it previously paid for. Nor is the battle over. GAF remains entangled in its coverage litigation, which will require it to expend additional funds in attempts to have its policies honored.

GAF is not alone. Essentially every asbestos manufacturer is involved in the same or similar litigation, even though such litigation should not have been, and should not now be, necessary. The decisions in several coverage cases, including particularly *Keene* v. *INA*, 667 F.2d 1034 (D.C. Cir. 1981), cert. denied, 455 U.S. 1007 (1982), decided here in Washington, have determined the insurance coverage issue in the asbestos litigation. Moreover, the result in Keene was the same as what a majority of the largest insurance carriers had privately decided was the most appropriate coverage rule, as early as 1977.

H.R. 1626 makes a significant improvement in the manner of addressing insurance coverage issues by recognizing the importance of the defense obligation in primary comprehensive general liability policies. The defense obligation was an essential part of the insurance policies purchased by companies like GAF, and it would be improper to value insurance coverage without taking into account the essential nature and the enormous value of this contractual commitment. H.R. 1626 recognizes the defense obligation, and thus represents a significant improvement over earlier legislative proposals that have largely overlooked these provisions.

GAF hastens to add that the insurance provisions of H.R. 1626 still leave many important ambiguities and unanswered questions. For example, H.R. 1626 does not provide for situations where policy existence or the nature or extent of coverage is in dispute. Nor does H.R. 1626 provide for unlimited aggregate policies or for a precise method of allocating costs among policies and policy years. These are very important matters that must be addressed.

C. ADEQUACY OF THE JUDICIAL SYSTEM IN HANDLING ASBESTOS-RELATED HEALTH CLAIMS

As pointed out, GAF believes much of the current "backlog" in the tort system would be eliminated if insurance coverage controversies were resolved and an adequate contribution level were established for the Federal Government. H.R. 1626 also helps the existing situation by requiring workers to resort first to the existing workers' compensation system. At present, many workers bypass the workers' compensation system, and do not take advantage of available benefits.

In this area, GAF supports H.R. 1626's reliance on the workers' compensation system, at least initially. GAF cautions the Committee, however, that there are many complex issues of fairness and efficiency that are involved in a complete rejection of the judicial-based tort system. GAF's experience is different than that of many affected parties, and may be helpful for the Committee to consider.

In the first place, when compared with other types of litigation, such as automobile cases, the number of asbestos-related health claims is not excessive. Approximately 6,000 asbestos cases are filed each year on a nationwide basis, with a large number of these cases concentrated in the State of California. Certainly, in comparison to automobile cases, the number of asbestos-related cases is not that large, even in these jurisdictions.

In GAF's experience most cases claiming asbestos-related health effects are settled after processing of the cases, upon a showing that products formerly manufactured by GAF or its predecessors were present at job sites at which the claimant worked, upon obtaining an assessment of the injury to the claimant and a showing that the injury is asbestos-related, and upon receiving a reasonable settlement offer from the claimant. GAF's experience, therefore, is that the present tort system for the most part functions adequately, and even well, in getting compensation to those who are deserving. Compensation is awarded to injured parties as promptly as possible, and awards are made based on actual degree of injury and not on some artificial formula.

In GAF's own experience, the litigation costs associated with these awards are not excessive. Figures that have often been used concerning the percentage of compensation which is actually received by the claimant are, for responsible companies like GAF, exaggerated. There are, of course, notable exceptions to GAF's experience, both in individual worker cases, and with respect to many former manufacturers and suppliers.

It is inevitable that there will be costs involved in the processing and evaluation of claims, regardless of the compensation system. Furthermore, in order for any compensation system to function, there must be an evaulation of claims, deletion of frivolous or fraudulent claims, and maximization of recoveries to parties actually suffering injuries caused by asbestos itself, and not by the ingestion of other substances. GAF suggests that any claims processing and evaluation mechanism will require significant expenditures to prevent misallocation of available funds.

The Committee should thus consider carefully the wholesale rejection of the tort system. GAF urges that any effort to address asbestos-related health issues must allocate responsibility only where there is a demonstrable nexus between a manufacturer's products and proven injuries, and must fairly allocate responsibility among parties that caused asbestos-related health injuries, including the United States Government and private contract shipyards, as discussed further below. A mechanism must also exist for resolving novel and difficult factual and legal disputes that will continue to arise. These are complex issues that will require careful scrutiny by the Committee, as well as delicate solutions.

D. OTHER NEEDED ADJUSTMENTS IN H.R. 1626

Another significant issue that must be addressed is the inclusion of all responsible parties as contributors to the compensation fund. Most asbestos-related disease was caused directly by inadequate health precautions taken in the workplace environment. Private contract shipyards—most of which were equally as familiar with asbestos-related hazards as the Federal Government, at just as early a date—must bear a large share of the financial responsibility for asbestos-related disease. As with the Federal Government, these entities have to date largely avoided their responsibilities. In addition, GAF has uncovered the fact that these shipyards have vast amounts of insurance potentially covering asbestos-related health claims. The Federal Government is, as well, an additional insured under many of these policies. A similar situation exists with respect to large and sophisticated entities in many lines of business that exposed their workers to excessive levels of asbestos.

CONCLUSION

The asbestos compensation issue has not lent, and does not lend, itself to any easy solution. There are undoubtedly solutions to this national problem. However, as this Committee recognizes, the "easy solution" of simply looking to the manufacturer is unfair and unworkable. A number of manufacturers, including GAF, were only passive participants, who supplied asbestos thermal insulation products at the Government's encouragement and with its support; financial and otherwise. If the Government and its contract shipyards were to bear their fair shares of responsibility, it is possible that, on a national basis, there is sufficient insurance coverage, through existing workers' compensation and comprehensive general liability policies—which have been in force since, in some cases, the 1920's—to provide appropriate compensation for asbestos disease victims in the United States.

GAF encourages this Committee to concentrate on assuring proper insurance industry, Government and contact shipyard contributions to provide a fair and equitable remedy. And, in framing any remedy, GAF submits that principal reliance should be placed on the private mechanisms and groups that have substantial experience in asbestos claims management and compensation. This will assure the most expeditious and efficient approach.

Mr. SHEA. Thank you, Mr. Chairman.

Mr. Chairman, prior to coming to GAF Corp., I had been an author of a number of articles in Bar journals on the subject of product safety and emphasized that that problem consists of several elements.

They are design, materials used, manufacturing, distribution and use. I emphasized that the problem of product safety cannot be solved in any context in the absence of legal responsibility being placed upon the user.

The present system, of course, focuses almost entirely on the manufacturer.

The user influences manufacturing decisions in its role as a customer. We all know that the customer is king, even the small customer with regard to the large manufacturer.

We read in the newspaper today that Coca-Cola Co. is changing its famous formula in response to customer preferences.

In many cases the industrial manufacturer does not know the applications to which a customer applies its product because the customer's applications are trade secrets.

The customer and user is also the first to see developing problems, which it may or may not convey back to the manufacturer.

In the circumstance of asbestos, the Government designed the products and specified the materials. The Government even specified the packaging and the labels.

The Government also had sole control over the use of the products and the environment in which they were used.

The second point I want to mention is the availability to the Government of a large volume of insurance coverage which was maintained by the contract shipyards throughout this entire period, many, many millions of dollars of insurance. Yet so far the legal system has not brought into play the contract shipyards or the vast amount of insurance available for the protection of the U.S. Government—named as an additional insured under those policies.

The third point I would like to mention is to commend the bill on its introduction of a national medical panel.

In our experience, which is described in my written submission, we find that many—really approximately two-thirds—of the claims show only minimal effects of asbestos.

The legal claims are then based on the allegation that the injury may grow more serious with time or on health problems arising from other sources. These may include such varied causes as aging, obesity, emphysema, smoking, other industrial substances, and in some cases perhaps the real problem is even low retirement benefits.

So, a medical panel could be immensely helpful in sorting out proper responsibility for claims in the asbestos field.

We have another specific concern with regard to title II, section 201, which you will find in your bill on pages 55 and 56.

We think you have been reasonably careful, but we would like to emphasize that insurers should not be granted a new argument to limit liability through use of inadvertent language in this act.

We are a party to the major litigation in San Francisco. The insurers have introduced every possible legal ground for alleging they should not be responsible. You would not wish inadvertently to create still another in this act.

Finally, I would like to draw your attention to a provision on successor liability which appears in section 201(e)(5) of the act.

GAF Corp. is a vital, growing business that is and has been principally a chemical manufacturer. GAF is and has been meeting its claim obligations through our own asbestos claims facility, which we believe has handled the asbestos claims more effectively than any other company.

But we will over the years need to buy and sell assets.

Under the present language of the act, any buyer of assets will find itself placed under a cloud if they buy assets from a company which has been an asbestos manufacturer.

We submit that a buyer who pays a fair price for an asset for business should not be under a cloud if the seller is an ongoing business with substantial assets, such as GAF.

We ask that you consider the problem of the vital, ongoing business in your further consideration of that section.

Pursuant to your request, I wil.——

Mr. Murphy. Thank you. I am very anxious and will read your testimony through, Mr. Shea.

May I ask you, do you participate in the so-called Wellington group?

Mr. Shea. No, and I do have some comments I can offer on that. We have not signed with the Wellington group and you may be interested in some of our reasons, because we have spent some time——

Mr. Murphy. The same reasons that were given earlier by Mr. Ross?

Mr. Shea. No, they are a little different, I think.

Mr. Murphy. OK, go ahead.

Mr. Shea. First, we do not oppose Wellington but we have not joined.

Wellington is unproven, as compared to our own asbestos claims facility which is a very efficient facility which handles claims at modest and reasonable costs.

We are concerned, like Mr. Ross, that the plaintiffs' attorneys may be selective in choosing the claims which they present.

We are concerned that the insurers limited coverage too much in the Wellington agreement, particularly with regard to the issues of unlimited defense, with regard to the limitations placed on unlimited aggregate policies, and we are concerned that they have no provision for insurance coverage which companies had prior to the time when they acquired or entered into the asbestos business. That is part of the litigation, but it prevents us from joining Wellington, in part.

We are concerned about the administration of Wellington and that, if there is not appropriate supervision of claims, the administration might exhaust funds too rapidly, thus leaving inadequate funds for later claims, and we are also concerned that the United States is not a party.

Mr. **Murphy**. What would be the effect of passing this bill for a company whose insurance coverage is in dispute as to the existence and amount of coverage? Do you have that situation existing with you?

Mr. **Shea**. We would be concerned if the bill mandated that we begin to contribute prior to the resolution of the insurance coverage questions.

We hope to have those questions resolved in the fairly near future, because the litigation in San Francisco is in progress.

But we would not wish to be placed in a position vis-a-vis the insurers where we were being mandated to begin contributions before we could reach a settlement with them, because that would enable them to place pressure on us in settlement.

Mr. **Murphy**. Is the same true whether there is a verdict or a settlement in your case?

Mr. **Shea**. Well, the case will, of course, over the next year go to trial and, of course, then there may be appeals. So, it is difficult to make a distinction between whether it will go to trial or come to settlement.

We are open and we do discuss settlement in good faith as we can.

Mr. **Murphy**. I am sure.

Mr. **Shea**. Yes.

Mr. **Murphy**. OK. Thank you very, very much, Mr. Shea, I am sorry we don't have more time but I did promise my members—and I see most of them have kept that promise and they have gone over to the session.

Thank you.

Mr. **Shea**. Thank you, Mr. Chairman.

Mr. **Murphy**. Thank you.

[Whereupon, at 3:42 p.m., the subcommittee was adjourned.]

HEARINGS ON COMPENSATION FOR OCCUPATIONAL DISEASES

TUESDAY, JUNE 11, 1985

House of Representatives,
Subcommittee on Labor Standards,
Committee on Education and Labor,
Washington, DC.

The subcommittee met, pursuant to call, at 10:10 a.m., in room 2175, Rayburn House Office Building, Hon. Austin J. Murphy (chairman of the subcommittee) presiding.

Present: Representatives Murphy and Petri.

Staff present: Richard Fiesta, subcommittee counsel; Thomas Lamb, subcommittee staff director; and Bruce Wood, minority counsel.

Mr. Murphy. Good morning. Due to the chairman's tardiness in arriving, we will dispense with the chairman's remarks and submit them for the record.

[The opening statement of Hon. Austin J. Murphy follows:]

Opening Remarks of Hon. Austin J. Murphy, a Representative in Congress From the State of Pennsylvania and Chairman of the Subcommittee on Labor Standards

The Subcommittee on Labor Standards will come to order, for the purpose of receiving testimony on asbestos compensation.

Today the Subcommittee reconvenes in a series of hearings addressing the problem of compensation for American workers who suffer from exposure to asbestos. As I have stated before, it is my earnest hope that all interested parties from asbestos manufacturers, their insurers, exposed workers, and the government can work harmoniously to create a fair, efficient, and equitable system of compensation.

Today the Subcommittee hears from several witnesses, each with the ability to testify with differing prespectives on the asbestos compensation problem. I thank the witnesses for coming today and our first witness is Mr. Joseph Hollingsworth.

Mr. Murphy. We will, therefore, commence with our first witness of this morning's second in a series of hearings on asbestosis and call to the witness table Mr. Joseph Hollingsworth, an attorney here in Washington.

Mr. Hollingsworth, you may proceed.

STATEMENT OF JOSEPH HOLLINGSWORTH, ATTORNEY-AT-LAW, SPRIGGS, BODE & HOLLINGSWORTH

Mr. Hollingsworth. Good morning, Mr. Chairman, members of the committee.

My name is Joe Hollingsworth. I am with the Washington, DC, law firm of Spriggs, Bode & Hollingsworth.

I will summarize briefly the written remarks which I have submitted for the record this morning, but first I would like to thank you, Mr. Chairman, and the members of the committee for having me here and permitting me the opportunity to make this statement today.

Our firm has, for two years now, represented two former asbestos insulation manufacturers, Eagle-Picher Industries, Inc., a company out of Cincinnati, OH, and UNR Industries, Inc., a company out of Chicago, IL. We represent them principally in connection with the actions that the two companies have brought against the Government under various theories in connection with the tremendous influx over the past 6 or 7 years of asbestos litigation against the companies arising mostly from exposure to asbestos fibers and asbestos products and dust out of shipyards in the United States, both Federal and private shipyards operating under Government contract.

The products involved are pretty simple. Eagle-Picher manufactured one product known as the thermal insulation cement called Eagle 66. It contained about 6 percent asbestos. It was first approved by the U.S. Government for use in naval vessels in 1935, or thereabouts, perhaps a little bit earlier. We have determined that about 90 percent of the company's exposure to the shipyard litigation which it is now involved in occurs because of exposure to this particular product.

The other company, UNR Industries' background in the litigation is also relatively simple. The company, beginning in the early 1930's, manufactured two thermal-insulating products which were designed specifically for the U.S. Navy and for use on Navy vessels. Those products were known as Insubestos and Unibestos. One was a preformed pipe covering and the other one was a preformed type of lagging, blanket lagging, which was used to cover broad surfaces such as boilers and what have you onboard naval vessels during construction and repair.

Both products, as I said, were designed specifically for the Navy. They were approved for Navy use and tested, designed and developed hand in hand with the Navy beginning in about the 1930's. Indeed, in the case of UNR, the Government later, by about 1940, directed that it establish a plant in New Jersey which could serve the shipyards in Philadelphia and New York during the tremendous shipbuilding effort that ensued before the start of World War II in this country.

The shipyard litigation itself, we believe, accounts for over two-thirds of the overall litigation brought against our two clients. Eagle-Picher has now been sued over 30,000 times in Federal and State courts across the country, as you are aware. Over 20,000 of the suits have arisen out of shipyard work and exposure to shipyard workers, beginning from World War II and continuing thereafter.

UNR, in 1982, because of the press and the expense in administering some 17,000 lawsuits which had been brought against it up to that time, filed for protection under the reorganization provisions of chapter 11 of the Bankruptcy Code.

With that background, Mr. Chairman, I would like to tell you that our clients support H.R. 1626 in most respects. We applaud the fact that it brings to bear the resources of the three principal parties or groups of parties which are responsible for the litigation, which are responsible for putting all the massive litigation in the state it is currently in; namely, the U.S. Government, the manufacturers themselves, and the insurance companies.

I would like to provide the committee with a brief update on where the litigation against the Government stands, at least from my standpoint, at this point. We are attempting to bring affirmative, offensive claims against the United States. None has yet been heard on its merits, however.

There are two principal theories and you may be aware that Federal statutes waiving sovereign immunity provide two basic routes of access against the Government for redress by private parties. One is the Tucker Act, in which the Government may be sued in matters which sound like contract. We have brought litigation against the United States on behalf of both of our clients, as have four or five other manufacturers, in the U.S. Claims Court in which virtually exclusive jurisdiction under the Tucker Act exists.

The theory is based on contract-type theories and on the well-established principles in Government contract litigation which permit manufacturers to bring actions for compensation against the Government under implied warranty-type theories. There are other theories involved in this case involving defective Government-furnished property, for example. By way of example, UNR was supplied with the amosite asbestos, which it used to manufacture its products during the war by the Government. So one of our theories has to do with the supply of a defective product, technically.

That litigation, although we have withstood the Government's first motion to dismiss, is now in extensive discovery. You may have heard, and I know you have read in other people's testimony, about the extensive documentation involved in connection with the Government's procurement of asbestos products and in connection with its knowledge of the risks of exposure to asbestos. There are a million pages of relevant pre-1945 documents alone, for example.

We have had a brief battle recently with the Government in connection with trial dates. We first proposed late 1985 and the Government said it couldn't get ready until 1987. So that litigation, extensive as it is, appears to be facing some delay at this point, and, of course, there has been no decision on the merits.

The other theory of liability against the Government in the sovereign immunity wedge which we use against the Government arises under the Federal Tort Claims Act. I have described the theories in my testimony which we have used thus far successfully in part and those are based on the Government's requirement for the use of asbestos continually from 1935 in various products, particularly those in which our clients are involved in, despite its extensive knowledge from that point and its continuingly increasing knowledge about the risk of exposure to asbestos.

We know, for example, that in 1918, the Department of Labor first published a report which stated that asbestos exposure in occupations was hazardous. We know that in the 1930's, the health agencies and their predecessors enlarged on those reports. We know that in the 1940's, through Government documents, some of which were top secret until the last couple of years, that the Government was aware that shipyard workers were being exposed to dangerous levels of asbestos dust during the massive shipbuilding effort.

We know that in the mid-1940's, the Government undertook about 200 reviews, which, as I indicated before, a couple of years ago were always classified as top secret, of private and public shipyards in which they determined that there was a risk of exposure to asbestos which would probably result in injury later.

In the 1950's, it was Government doctors who first published about and made the connection between asbestos and a possible link to cancer. In the 1960's, the Navy's knowledge increased, as did others in the industry and elsewhere based on publicly available medical literature and on epidemiologic studies and on other things.

It is the Government's increasing knowledge which forms the basis for our litigation against them in connection with the shipyard work which took place beginning in World War II. Also, under the Federal Tort Claims Act, we have successfully made a claim, at least preliminarily, for the Government's maintenance of unsafe workplaces, and there is a lot of data and information in evidence being generated to support that claim right now.

Third, the basic claim goes to the—under the Federal Tort Claims Act—the Government's failure to warn its workers from the 1940's and thereafter about exposure to unsafe levels of asbestos dust, having known that the risk existed and was real.

The third-party litigation is brought in two parts, as I described in my written statement. One, under the Federal Tort Claims Act in which we are permitted to implead the United States in pending litigation. This is incredibly expensive, time-consuming and inefficient. There has been third-party litigation in several jurisdictions so far, three of which we participated in, in Maine, Pennsylvania, and Hawaii, in which district judges have upheld the right of the manufacturers, including our clients, to seek contribution and indemnity against the Government in connection with the Federal shipyard litigation exposure.

In one case in Connecticut in which we did not participate, the Government was dismissed. These cases, however, are being appealed. The main decision is on appeal to the first circuit now. It was argued earlier this year. We have no idea when a decision is coming down. We understand from the Government that they will be filing similar motions to dismiss our cases on which we have already succeeded so far in other jurisdictions, maritime jurisdictions in which we have proceeded in the third-party cases.

There is a second way to sue the Government under the Federal Tort Claims Act, which we have also engaged in. It is known as the administrative claims route, under which a claimant, after 1966, is permitted to bring a claim of whatever amount against the Government, but first at the agency level. We have done so in all the cases which have been settled or litigated to judgment, cases which are not pending and cases which we, therefore, would not be able to sue the Government in pending litigation.

Those claims have been reviewed by the Government, but the Government has, pursuant to Department of Justice policy, decided that the claims do not contain enough information about what the Government's real liability is for the exposure of shipyard workers to asbestos. The Justice Department policy is to require the manufacturers to give more and more and more information, presumably ad nauseum, I think just to delay the progress of the litigation.

Unfortunately for our clients, the Government has succeeded thus far in dismissing the litigation from those administrative claims which we have brought to date here in the District of Columbia. That case is on appeal and the appeal will go here at the D.C. circuit solely to the question of whether our clients have provided sufficient notice to vest jurisdiction in a district court under the Federal Tort Claims Act, a highly technical and crabbed type of argument which does not permit us to get to the merits of the Government's alleged negligence in these cases.

Together with that, I have quoted in my testimony, my written testimony, the stated Department of Justice policy, which is exactly contrary and I think totally at odds with the position it has taken in the litigation; namely, that it shall be DOJ policy to reject and not consider under any circumstances settling an asbestos claim brought against the Government.

So where we stand now, I think, is headlong into a course of very expensive and, I think, very time consuming, and I think very unproductive and inefficient litigation against the Government if we are to succeed in just getting to the merits sometime this year or next year or, if the Government has its way, in 1987. Obviously, the expense and the delay, I cannot overemphasize.

Our conclusion, therefore, Mr. Chairman, is that we support in most respects H.R. 1626 and we applaud your introduction of it. We would encourage you and the members of this subcommittee to give it favorable consideration.

Thank you very much.

[The prepared statement of Joe G. Hollingsworth follows:]

PREPARED STATEMENT OF JOE G. HOLLINGSWORTH, SPRIGGS, BODE & HOLLINGSWORTH, WASHINGTON, DC

Mr. Chairman, Members of the Subcommittee: My name is Joe G. Hollingsworth. I am a partner in the law firm of Spriggs, Bode & Hollingsworth of Washington, D.C.

For more than two years, our firm has represented two corporations—UNR Industries, Inc., of Chicago, Illinois ("UNR") and Eagle-Picher Industries, Inc., of Cincinnati, Ohio ("Eagle-Picher")—formerly engaged in the manufacture and sale of asbestos-containing thermal-insulation products. Our representation of UNR and Eagle-Picher has been (and continues to be) devoted principally to the assertion of legal claims against the United States Government, for the staggering losses incurred by those companies in the defense, settlement and satisfaction of judgments in the thousands of asbestos-related lawsuits which have been brought by federal and government-contract shipyard workers who have been injured as the result of the actions (and the omissions) of the United States Navy and other federal agencies.

For nearly four decades, both UNR and Eagle-Picher distinguished themselves as leading suppliers of strategically critical insulation products to the United States Navy for use in the construction and repair of United States naval and merchant vessels. During that entire period of time, the asbestos-containing insulation products manufactured and sold by UNR and Eagle-Picher to the Navy (and to private shipyards operated for the benefit of the United States, pursuant to government contracts) were subject to—and at all times manufactured with unfailing compliance with—mandatory government contract specifications which (expressly, in most instances) required the use of asbestos as a principal ingredient. Throughout and following World War II—during which time the federal government asserted complete control over the importation, distribution and use of asbestos in this country—both UNR and Eagle-Picher were repeatedly commended for their extraordinary contributions first to the war effort and, later, to the Nation's defense in the post-war period. Ultimately, however, the "reward" which has been bestowed upon these companies for those contributions has not taken the form of awards, commendations or even profits. Their reward, rather, has been the institution of thousands of personal-injury lawsuits by federal and government-contract shipyard workers around the country. So severe has the burden of that litigaiton been in recent years that UNR has been forced into reorganization proceedings under the bankruptcy laws of the United States.

Both UNR and Eagle-Picher have instituted legal actions against the federal government—the party which caused the phenomenal increase in the use of asbestos in this country in the 1930's and 1940's; the party which (despite extensive knowledge of the dangers of occupational exposure to asbestos) persisted for more than 40 years in requiring the use of large quantities of asbestos in all insulation products used at the Nation's shipyards; and the party which, for more than 40 years, ignored its own safety rules and regulations and thereby knowingly exposed thousands of shipyard workers to unsafe concentrations of asbestos dust.

Mr. Chairman, I believe that the moral responsibility of the United States to participate in the resolution of the national asbestos crisis—a crisis largely of the federal government's own making—is clear. I am confident also that the legal responsibility of the Government will ultimately be established in the courts. I am concerned, however, that the efforts of companies such as UNR and Eagle-Picher to pursue their legal claims against the United States have themselves become a major drain upon the limited resources of those companies. I am concerned also about the fact that the United States, through the Department of Justice, has decided to wage a long-term war of attrition, advocating hypertechnical—and often contradictory—positions designed not to be absolve the Navy or other agencies from blame in this situation, but rather to avoid judicial scrutiny altogether on procedural and jurisdictional grounds and on the basis of questionable claims of sovereign immunity. Mr. Chairman, legislation such as H.R. 1626 has the potential of putting an end to all such costly and wasteful litigation.⅓

What distinguishes H.R. 1626 from earlier versions of proposed legislation designed to deal with the asbestos crisis is its forthright recognition of the fact that the United States—whether intentionally, negligently or innocently—did play a major role in the exposure of thousands of individuals to asbestos. Without assessing blame or hurling accusations, it seeks to draw into the solution of this unprecedented problem all of the elements of our society which contributed to the creation of the problem in the first place. I—and the other members of this panel, I am sure—applaud that fair-minded and even-handed approach to this otherwise perhaps insoluble situation.

Mr. Chairman, in the balance of my remarks, I will outline for the Members of the Subcommittee both the nature of the manufacturer's legal claims against the Government and the Justice Department's response (or, perhaps more appropriately, its lack of response) to those claims. I believe that such a discussion will serve to illustrate both the bases upon which legal responsibility of the United States is predicted in this matter and the very serious drain of resources which is being occasioned by the Government's hardline efforts to avoid legal scrutiny of the merits of the manufactures' claims.

The legal claims of the manufacturers against the United States are currently being pursued under the Tucker Act, 28 U.S.C. § 1346(a)(2), and under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b), 2671-1680.

The Tucker Act confers upon the United States Claims Court exclusive jurisdiction over all contract claims against the United States in excess of $10,000. The manufacturers' Tucker Act claims against the Government arise out of the Government's breach of contractual obligations undertaken by the Government in course of its design and procurement of insulation products from the plaintiff manufacturers. Among other things, the manufacturers allege that the United States, under well-established principles of federal government contract law, warranted that products manufactured in compliance with mandatory contract specifications developed, promulgated and contractually enforced by the Navy (and other government agencies) would be safe for their intended use.

In 1983, the Government moved to dismiss Eagle-Picher's Tucker Act complaint on technical grounds that bordered on the frivolous. The Claims Court denied that motion in a most summary fashion, but only after briefing and oral argument. Last year, the Government moved, and the Claims Court ruled (over the manufacturers' objections) that the Tucker Act cases of several former asbestos-product manufacturers (including both UNR and Eagle-Picher) be consolidated for purposes of discovery. Extensive discovery efforts have since been instituted by the Government.

We (along with counsel for the other manufacturers which are asserting contract claims against the Government) have made every effort to expedite the pending Claims Court litigation, but those efforts have been resisted by the Government. Recently, for example, counsel for the Government indicated that the United States would not be ready for trial until 1987. Hopefully, the Claims Court will not permit this litigation to drag on for another two years.

The manufacturers' tort claims—which are being pursued under the FTCA—arise from the first that the United States acted wrongfully and negligently in, among other things, (i) requiring the use of asbestos in its insulation products despite knowledge of the health risks attendant to such use, (ii) knowingly creating and maintaining grossly unsafe working conditions at the Nation's shipyards and aboard naval and merchant vessels, and (iii) failing to warn its shipyard workers of the known dangers of asbestos products or of available protective equipment and procedures.

Procedurally, the manufacturer's claims take two forms. Under the FTCA, a tort claim may be asserted against the United States either (i) by means of a third-party complaint under Rule 14 of the Federal Rules of Civil Procedure or (ii) after the filing of an administrative claim pursuant to 28 U.S.C. §2675(a). Eagle-Picher has pursued both avenues; UNR (because of the fact all tort actions against it have been stayed by operation of the Bankruptcy Code), only the latter.

Eagle-Picher has asserted third-party FTCA claims in Maine, Pennsylvania, Hawaii, Washington, North Carolina and Virginia. The Government has moved to dismiss those claims in Maine, Pennsylvania, Hawaii and Virginia, and is expected to file a similar motion in Washington within the next several weeks. Three district courts have ruled on the Government's motion to dismiss, and the results have been most encouraging from a legal point of view.

I should note that slightly different legal principles govern those claims arising out of federal shipyards than govern claims which arise out of privately-owned government-contract shipyards. In the federal shipyard context, the Government is sued for its wrongful and negligent acts and omissions (i) under state law in its capacity as the employee of the injured shipyard workers and (ii) under federal maritime law in its capacity as owner of the vessels on which those workers worked. In the private shipyard context, the Government is sued (i) under state law as the party which, by regulation and contract, had and exercised control over working conditions at the shipyard and (ii) under federal maritime law in its capacity as vessel owner. The only claims which have been dismissed to date are those in the federal shipyard context which are founded upon state law. All of Eagle-Picher's other tort claims have survived the Government's motions to dismiss. (The Government has appealed to the Court of Appeals for the First Circuit from Judge Gignoux's ruling in Maine which upheld Eagle-Picher's federal maritime claims in the federal shipyard context.)

I hasten to note, however, that despite these legal successes, we are painfully mindful of the fact that litigation of these FTCA claims on a piecemeal case-by-case basis is impractical. As I indicated previously, more then 30,000 lawsuits have been filed against Eagle Picher; of that number, more than 20,000 are shipyard cases. It is simply not possible for Eagle-Picher to litigate 20,000 separate actions, however meritorious, against the United States.

This being the case (and in light of the fact that the underlying personal injury cases are necessarily being settled voluntarily by Eagle-Picher to the greatest extent possible), we have sought to present the bulk of the manufacturers' tort claims through the administrative notice procedure established by the FTCA. It has been in this arena that the Government's refusal to meet the merits of those claims has been most disturbing.

Mr. Chairman, I think that a bit of background information will help the Subcommittee appreciate the abusiveness of the tactics being employed by the Justice Department in its treatment of the manufactuers' FTCA administrative claims.

By its enactment of the FTCA in 1946, Congress waived the sovereign immunity of the United States, and conferred upon the federal district courts jurisdiction over tort suits against the federal government. Under the FTCA as originally enacted, a person whose tort claim against the government was for $2,500 or less had the option of seeking voluntary administrative settlement of his claim pursuant to 28 U.S.C. § 2672 or of proceeding directly to initiate a lawsuit in district court pursuant to 28 U.S. § 1346(b). A persons whose claim exceeded $2,500 had no choice but to file suit, since an affected agency's authority to settle claims was limited by 28 U.S.C. § 2672 to $2,500.

By 1966, it had become apparent that the inability of agencies to settle meritorious claims for more than $2,500—and the consequent necessity of a claimant's initiating federal court action for claims in excess of that amount—resulted in unnecessary litigation which imposed undue burdens upon the federal courts and undue delay and expense upon claimants. The Senate Judiciary Committee expressed concern about the fact that, even if the agency finds that it is clearly liable and desires to settle the claim quickly in the interest of justice and fairness, it cannot do so if the claim is for much more than $2,500. Rather, a suit must be filed and a settlement negotiated after the action is begun in a U.S. district court. [S. Rep. No. 1327, 98th Cong., 2d Sess. (1966, reprinted in [1966] U.S. Code Cong. & Admin, News 2515, 1517]

To remedy this situation, Congress amended the FTCA in 1966. As explained in the accompanying Senate Report, the purpose of those amendments was to provid[e] for more fair and equitable treatment of private individuals and claimants when they deal with their Government or are involved in litigation with their Government . . . The [amendments] are intended to ease court congestion and avoid unnecessary litigation, while making it possible for the Government to expedite the fair settlement of tort claims asserted against the United States. [Id., [1966]. U.S. Code Cong. & Admin. News, at 2516.]

In order to achieve this result, Congress (i) eliminated the $2,500 limitation on the agencies' settlement authority, and (ii) required that all tort claims be submitted initially to the affected agency for possible settlement. If the agency denies the claim—or if the agency fails to act within six months—then the claimant may file suit in district court.

The entire purpose of the 1966 FTCA amendments was to facilitate matters by permitting the voluntary settlement of easy cases in which the agency chooses not to contest liability. Mr. Chairman, in its treatment of the asbestos-product manufacturers' claims, the Justice Department has turned the 1966 amendment of 28 U.S.C. § 2675(a) on its head. In every instance, the Department of Labor (to which all such claims have been referred) has refused to take any action on—even to deny—the manufacturers' claims. Rather, it has taken the position that the manufacturers' voluminous claims have failed to provide sufficient detail to permit the Government to investigate the possibility of settling those claims. Thus, the Justice Department has argued, no "notice" has been given under 28 U.S.C. § 2675(a). That position has been advanced successfully (disingenuously, we maintain) in Eagle-Picher's FTCA case here in the District of Columbia. On April 30, 1985, Eagle-Picher's first FTCA complaint was dismissed on the basis of that argument. The fact of the matter is, Mr. Chairman, that the Justice Department succeeded in pulling the wool over the court's eyes.

Mr. Chairman, the Justice Department is singing two different and discordant songs—one to the courts, yet another to the Congress. To the courts, it says that the manufacturers have failed to satisfy the procedural requirements of the FTCA and that it (the Government) cannot therefore decide whether to settle or to deny the manufacturers' claims because —and I quote here from the Government's brief to the court in Eagle-Picher's case—"the United States called evaluate Eagle-Picher's claim intelligently and realistically based upon the skeletal information provided in its administrative filing." The fact of the matter is that—despite its dilatory protestations to the contrary in its court papers—the Government has already decided that it will not under any circumstances settle Eagle-Picher's (or any other manufacturer's) tort claims. Reference to the Justice Department's request to the Congress for Fiscal Year 1986 budget authorization makes this point perfectly clear—and unequivocally belies the position it has taken in the courts. Again, I quote:

The [Civil] Division has mounted an aggressive defensive campaign and implemented a policy of rejecting any and all asbestos settlement offers. The results to-date are impressive. . . . This record was achieved in the face of a rapidly expanding caseload and prior to the recent addition of adequate staff necessary to manage and conduct a centralized asbestos defense effort. With the infusion of additional personnel and state-of-the art application of automated litigation support to facilitate storage and retrieval of the vast asbestos document collection, the [Torts] Branch is mounting an aggressive, nationwide defense to the challenge to the public treasury by the asbestos industry and its insurers.

In other words, the Justice Department is spending millions of dollars on—and committing itself to the expenditure of many more millions of dollars to—an all-out asbestos-litigation war. I submit, Mr. Chairman, that that money—and the additional millions of dollars now being expended by the manufacturers in pursuant of their meritorious tort claims against the Government—would be better spent by participation in a cmpensation fund such as that envisioned by the sponsors of H.R. 1626.

If the asbestos litigation explosion has demonstrated anything, it has shown the wastefulness of endless litigation for litigation's sake. Enactment of H.R. 1626 would be the most productive and significant action possible if we as a Nation are truly committed-to the prompt and fair compensation of asbestos victims.

In conclusion, Mr. Chairman, we urge prompt and favorable consideration of H.R. 1626 by this Subcommittee.

We thank you for the opportunity to express these views.

Mr. MURPHY. Thank you very much, Mr. Hollingsworth.

Mr. Petri, do you have any questions?

Mr. PETRI. One or two. I was interested in the qualified support of H.R. 1626. In what respects do you have questions about the bill or what would you change or improve, from your point of view, in the legislation?

Mr. HOLLINGSWORTH. The provisions having to do with assessments against companies in chapter 11 at the point when the act is passed. I think, in the case of my client, UNR, which is in chapter 11 because it simply ran out of cash in 1982 due to spending a million dollars a month just administering these cases, that provision, if I read it correctly—and I don't claim to be an expert on this legislation—would, on the day the bill passes, force that company into liquidation. So you would have a company with, I think, approximately $200 million in net worth if it continues as an operating and successful entity, which suddenly is in liquidation and is worth orders of magnitude, I think, less.

The claims made against it, then, by the trust fund would be worth less. That seems impractical to me and I don't have any solution for it, but I can tell you that if the bill goes in as it currently exists, I think, if I understand it correctly, that UNR would be in liquidation as of that day. Obviously we can't accept that.

Mr. PETRI. The reason for that is that they would be required to come up with a lot of money immediately, is that——

Mr. HOLLINGSWORTH. If I read the provision correctly, yes.

Mr. PETRI. Are there any other difficulties aside from the fact that it would eliminate your client?

Mr. HOLLINGSWORTH. That is the basic provision with which we do not agree. The rest of the bill, I think, is one that you should be applauded for.

Mr. PETRI. Excuse me, you may not know the answer to this and I guess I could find it from another source in any event, but I am just interested if you could tell us. Is it two or three cases that your firm is carrying on against the Government?

Mr. HOLLINGSWORTH. Yes. We are maintaining two major actions on behalf of each client in the U.S. Claims Court on the contract-based theories. We are also involved in several actions on behalf of the Eagle-Picher—under the Federal Tort Claims Act in maritime jurisdictions all over the country, including Hawaii, Washington, Maine, Pennsylvania.

Mr. PETRI. You are doing this on behalf of these corporations so it is not a contingency case, just a straight——

Mr. HOLLINGSWORTH. We represent the corporations.

Mr. PETRI [continuing]. Contribution case that you are——

Mr. HOLLINGSWORTH. Yes, we are seeking contribution or indemnity against the United States. We are seeking to prove that the United States was negligent under the various theories I described and the relief that we seek is either a total risk shift to the United

States, if our case is strong enough, or a risk sharing or contribution in some percentage, like 50-50, between our company and the United States, based on the relative degree of negligence which each bore.

Mr. **Petri**. Are your clients signatories to or contemplating joining into the Wellington arrangement that is being worked on now by a number of companies and insurers involved in this whole situation?

Mr. **Hollingsworth**. Yes, I believe Eagle-Picher is a conditional signatory to Wellington and I believe UNR Industries is considering the Wellington proposal at the present time.

Mr. **Petri**. Thank you.

Mr. **Murphy**. Just to follow up on that, do you believe that if the Wellington facility is successful, that Federal legislation would still be needed?

Mr. **Hollingsworth**. Speaking for myself, Mr. Murphy, in my opinion, Federal legislation would definitely still be needed even if Wellington comes about. Again, I am not an expert on Wellington, but you must understand that Wellington is not a complete solution to the problem. Wellington would still permit plaintiffs to seek redress in Federal or State court systems in the event they don't like the result they get in the Wellington arbitration procedure.

Mr. **Murphy**. And the Government is not in on the Wellington arrangement.

Mr. **Hollingsworth**. Exactly, Mr. Chairman. More importantly, the Government is not a part at all of Wellington. In the Government's responsibility for this litigation, which I noted at the beginning, at least two-thirds of which arises from shipyard exposure, would not be decided in Wellington, so I think it is fair to say that the litigation in which I am involved and the tremendous cost to that which runs into many, many millions of dollars for the Justice Department right now would continue. So it is not a solution for two reasons. It is not a complete solution to the litigation. I have a strong belief that many of the cases, the bigger cases especially, would still end up in the court system.

Mr. **Murphy**. Are you telling me that two-thirds of the litigation today is from shipyard workers?

Mr. **Hollingsworth**. For UNR and Eagle-Picher, whose products were used principally in the maritime industry, that is true. Two-thirds of the litigation or more, as of right now, is coming out of shipyard work.

Mr. **Murphy**. Under your contract theory of litigation—that is a unique twist to me as a lawyer how you are getting in that door—do you say that the Government provided you with the basic raw material all during the time of the use and manufacture of it?

Mr. **Hollingsworth**. That is one of the theories, your Honor, in the case of UNR specifically. Amosite fiber is only mined in South Africa. Prior to the war and during the war and thereafter, there was no secure supply of amosite fiber, so the Government undertook to supply it itself during wartime to the manufacturers, of which I know there were two in addition to UNR, my client, so that they could produce, using amosite fiber, the insulation products which the Government desperately needed to build the ships.

Mr. **Murphy**. Wouldn't the Government have a defense, though, that you specified—your company specified what material was to be used and then merely requested that it be furnished?

Mr. **Hollingsworth**. They would, your Honor—they would, Mr. Chairman, but—excuse me.

Mr. **Murphy**. You were probably in court yesterday.

Mr. **Hollingsworth**. They would, Mr. Chairman——

Mr. **Murphy**. Next week, you will be calling the judge chairman, you know.

Mr. **Hollingsworth**. Right.

The fact is that the products were specified by the Government. The express requirement in most cases for the products I mentioned to you for asbestos came from the Government. The Government started making those express requirements in contract specifications in the 1930's, so one theory would be what I call the defective Government-furnished property theory.

Another theory would be just a straight implied warranty theory made on the basis of the contracts between our clients and the Government beginning in the 1930s forward.

Mr. **Murphy**. That falls into the reports that you allege the Government was aware of as early as 1918, that they had some indication that asbestos was dangerous; is that right?

Mr. **Hollingsworth**. That is true. The Government's knowledge about the risk inherent in performing to those specifications would be an important element in those cases, I believe.

Mr. **Murphy**. Weren't your clients—weren't the manufacturers also aware of those early reports that there was some danger in the materials?

Mr. **Hollingsworth**. Those reports were made public, at least some of them. As I indicated, some of the evidence which was available to the Government during the Second World War specifically regarding shipyard exposure and shipyard risks were top secret, but some of the material was available to our clients. I am not sure, depending upon which client you are talking about, exactly whether they were, in fact, distributed within the corporations or not, but information like that was available to the whole industry, I believe. I think that is a fair statement.

Mr. **Murphy**. OK. Thank you very, very much, Mr. Hollingsworth. We appreciate it and, without objection, your entire prepared statement will be admitted into the record.

Mr. **Hollingsworth**. Mr. Chairman?

Mr. **Murphy**. Yes.

Mr. **Hollingsworth**. Excuse me, we would also like to submit for the record the testimony of William S. Leavitt, which is available in written form today. He is the vice president of Legal and Corporate Affairs for UNR. He was unable to be here in person because of a death in the family.

Mr. **Murphy**. I thank you very much and we do have Mr. Leavitt's testimony and, without objection, it, too, will be submitted into the record.

Thank you very much.

[The prepared statement of William S. Leavitt follows:]

PREPARED STATEMENT OF WILLIAM S. LEAVITT, VICE PRESIDENT, CORPORATE AND LEGAL AFFAIRS, UNR INDUSTRIES, INC.

My name is William S. Leavitt. I am Vice President for Corporate and Legal Affairs of UNR Industries, Inc., of Chicago, Illinois.

Mr. Chairman, I want to thank you and the other Members of the Subcommittee on Labor Standards for this opportunity to express the support of UNR for the principles reflected in H.R. 1626. I particularly want to express our appreciation to you, Mr. Chairman, for the leadership which you have displayed in recognizing and addressing the national crisis which, until recently, has been euphemistically referred to as the "asbestos problem."

As you are well aware, Mr. Chairman, more than 30,000 asbestos-related personal-injury lawsuits are currently pending in the state and federal courts of this Nation. New cases are being filed at a rate of approximately 500 per month. By now, I am sure, the Subcommittee has been provided with extensive testimony and evidence demonstrating the inability of the Nation's court system to deal effectively or fairly with the matter of compensating individuals injured as a result of asbestos exposure. You have heard also of the debilitating administrative and financial effect which the asbestos litigation has had upon state and federal courts throughout the country. And, I am sure, other witnesses have discoursed on the shameful fact that most—perhaps as much as three-fourths—of the hundreds of millions of dollars being spent annually on such litigation goes not to the compensation of putative victims of asbestos-related diseases, but rather to the enrichment of lawyers, "experts" and other professional components of the civil justice system. Although we might quibble about details, we believe very strongly that a comprehensive compensation structure such as that envisioned by the sponsors of H.R. 1626 should—indeed, must—be established by the Congress.

The one aspect of H.R. 1626 to which I want to address my principal remarks is its recognition that the United States Government itself—and the United States Navy in particular—bears a very large share of the responsibility for the asbestos tragedy. Such recognition is, I am convinced, absolutely essential to any equitable long-term resolution of the existing crisis. My conviction in this regard is, of course, rested in UNR's own experience—an experience which, I believe, graphically illustrates the pervasive role which the federal government has played in the creation and continuation of this national nightmare. It is that experience which I desire to share with the Subcommittee today.

For many years prior to 1970, predecessor companies of UNR (which I will refer to collectively as "Unarco") were engaged in the business of manufacturing and selling thermal insulation products for use in the construction and repair of United States naval and merchant vessels. Pursuant to federal government contracts, and in strict compliance with federal government contract specifications, Unarco used asbestos as an ingredient in some of its thermal insulation products.

Between 1968 and 1982, approximately 17,000 lawsuits were brought against UNR by persons alleging that they had suffered personal injury as a result of having been exposed to asbestos-containing thermal-insulation products manufactured by Unarco. Approximately 13,000 (some 65 percent) of those actions were initiated by persons alleging exposure to asbestos in the course of their employment at federal shipyards owned and operated by the United States government and/or at privately owned shipyards engaged in the manufacture and repair of United States naval and merchant vessels pursuant to federal government contracts. The economic impact of that litigation—coupled with the refusal of our insurance carriers to honor their policies of insurance—was so severe that, on July 28, 1982, UNR was forced to file a petition for reorganization, pursuant to Chapter 11 of the United States Bankruptcy Code, in the United States Bankruptcy Court for the Northern District of Illinois, in an effort to avoid further financial disaster and to prevent the loss of approximately 3,000 jobs in our plants.

Mr. Chairman, it is by now well established that the federal government was directly aware of the health hazards associated with occupational exposure to asbestos at least at least as early as 1918. By 1934—when Unarco undertook to produce its first asbestos-containing insulation product in response to requests by the United States Navy—the Department of Labor, the Public Health Service and the Bureau of Mines had all concluded that occupational exposure to asbestos dust posed a serious danger to the health of exposed workers. Despite that knowledge—which would increase dramatically as the result of top secret health surveys conducted the United States Navy at federal and contract shipyards in the early 1940's—the Government saw fit to develop and, for a period of more than 40 years, to implement and enforce mandatory contract specifications which expressly required the use of asbestos in thermal-insulation products used in the construction and repair of United States naval and merchant vessels at federally controlled shipyards throughout the Nation.

Unarco's principal asbestos-containing products—"Insubestos" and "Unibestos"—were both developed specifically for use on United States naval vessels. In each instance, the Navy controlled and actually participated in the design, development, testing and engineering of the product, by means of regulations, specifications, mandatory testing and approval, technical consultations with Unarco, and otherwise. Following rigorous testing and official approval, both Insubestos and Unibestos were, at all times, registered on the Navy's "Acceptable List of Approved Materials" (later referred to as the "Qualified Products List" or "QPL" as a product qualified for government procurement. Each time the Navy promulgated new or revised specifications, it required that each previously approved product be retested to determine whether the subject product satisfied the new qualification requirements for type or brand approval under the new or revised specification. Over the course of nearly four decades (until Unarco discontinued the use of asbestos in 1971), the Navy repeatedly tested and routinely issued Certificates of Approval for Insubestos and Unibestos under each new or revised Navy or military specification as a product qualified for government procurement.

With the outbreak of World War II in Europe in 1939, the United States undertook the most massive shipbuilding effort in world history. By the end of the War, the Nation had expanded its naval fleet from a one-ocean navy to a seven-ocean navy, and the national commitment to naval supremacy continued through the post-War period, through the Korean War and into the highly specialized nuclear shipbuilding program which continues today. From the outset of World War II, the Navy viewed asbestos as a critically important strategic material, and officially designated it as such. Almost immediately, the federal government undertook to stockpile vast amounts of asbestos and to assume absolute control over the importation, distribution and use of asbestos in this country. Most of the asbestos imported during the War and the post-War period was directed to use in the construction and repair of naval and merchant vessels at federally and federally controlled shipyards throughout the country.

The Government's unprecedented demand for asbestos-containing products during World War II had an immediate and profound effect upon Unarco. By 1940, the Government's requests for Unarco's asbestos-containing products had exceeded the company's productive capacity. As a result, the United States Government directed—indeed, it ordered--Unarco to establish a new production facility near major East Coast shipyards. In response to the Government's specific directive, and in order to fulfill existing and anticipated government contracts, Unarco established a plant in Paterson, New Jersey, to produce additional quantities of Insubestos and Unibestos. The plant became operational by June of 1941, and thereafter during the War virtually its entire output was supplied to government and governmen-contract shipyards.

Throughout World War II, Unarco responded to and satisfied the unprecedented requirements of the federal government and, in doing so, contributed materially to the Nation's war effort. Repeatedly throughout the War, Unarco's extraordinary efforts were officially and unofficially recognized by the Government. Both its Paterson, New Jersey, plant (in 1942) and its Cicero, Illinois, plant (in 1943) were awarded Army-Navy "E" Awards. In January of 1942, an official Navy report praised Unarco's efforts, noting that "[t]his contractor cooperates to the utmost and can be depended upon to meet all reasonable demands." A similar report in 1944 stated that Unarco's asbestos-containing products "were urgently needed during 1942 and 1943 for ship construction and the increased requirements were met by the company."

As I have already mentioned, Mr. Chairman, approximately two-thirds of the asbestos-related lawsuits which have been brought against UNR to date have been initiated by or on behalf of federal and contract shipyard workers alleging exposure to asbestos in the course of their shipyard employment. When one examines the recklessly deplorable conditions in which these shipyard workers were forced to work—as we have been able to do only as the result of expensive and time-consuming litigation discovery and the recent declassification of official documents—the reason for the predominance of this shipyard-related litigation becomes readily apparent.

Despite its early knowledge of the hazards of exposure to asbestos, the Government failed for serveral decades to take appropriate steps to protect shipyard workers. For example, in 1941, some two years after the Navy Surgeon General published a report recognizing that the inhalation of asbestos dust caused asbestosis, the Commander of the Navy's Preventive Medicine Division wrote about the inadequacies of asbestos control measures at navel shipyards. He stated: "We are having a considerable amount of work done in asbestos and from my observations I am certain that we are not protecting the men as we should. This is a matter of official report from several of our Navy yards."

As a result of several studies and reports generated by the Government in later 1930's and early 1940's the Navy and the Maritime Commission finally promulgated in 1943 the "Minimum Requirements for Safety and Industrial Health in Contract Shipyards." However, as numerous compliance survey reports show, flagrant violations of the Minimum Requirements occurred from 1943 through 1945.

I could spend hours discussing the hard evidence of the Government's negligence prior to and during the war years. But, I want to emphasize today that the federal Government's failure to protect its workers is not limited to the experiences of World War II. Although the Navy had long been acutely aware of the health hazards of exposure to asbestos, it did not establish a progam designed to properly protect Navy personnel and others from such hazards until 1978. As late as 1979, the Comptroller General of the United States reported that the Navy even then was not taking adequate precautions to take its shipyard workers from known asbestos dangers. Even today, Mr. Chairman, the Navy continues to violate existing OSHA and Navy asbestos-handling regulations. For this reason, federal legislation must accunt and provide for future claimants whose exposure to asbestos in recent years can be expected to cause asbestos-related illnesses in the future. Indeed, the conditions which still exist at just one government shipyard illustrate the magnitude of the problem that will be presented by future claims.

Our preliminary analysis of hundreds of asbestos exposure reports prepared by health inspectors at Pearl Harbor Naval Shipyard has identified thousands of workers who have been exposed—and who even today continue to be exposed—to asbestos far in excess of permissible limits established under federal law and the Navy's own regulations. Those reports document the fact that unacceptable exposure to asbestos persists because of inadequate training of personnel, lax enforcement and sometimes willful disregard of asbestos control procedures and regulations established to protect workers. I have personally observed this evidence unfold. In my experience, and given my legal training, I believe the level and frequency of the Government's failures in this regard would subject it to charges of willful negligence and exposure to punitive damages were it a private party. I would welcome the opportunity to supplement the record with information on this situation once our analysis is completed.

In light of the history of the Government's role in the use of asbestos, the question before Congress is simple. Should the Government be permitted to shirk its responsibility for hazardous working conditions which it created and allowed to persist, directly causing cancer and other diseases in workers who had no chocie regarding the workplace where they labored and who knew nothing of the dreadful consequences to be faced later? No impartial person looking at this situation coud conclude anything but that the Government must assume its fair and equitable share of the burden to the nation's health caused by its negligence in protecting thousands of Americans in service or in civilian workforces.

We have come to Congress to seek relief from the overwhelming burden so far borne only by manufacturers who responded to our Nation's call for loyalty and support in a time of national and world crisis. H.R. 1626 is an important step toward acknowledging that the Government must accept some level of responsibility for specifying a material it knew to be hazadous to human health, for continuing to insist on its use after gaining considerable, conclusive knowledge of the substance's health dangers, for controlling industrial production through wartime contracts and through the War Production Board's allocation of raw asbestos for use in manufacturing beginning in 1940, and for its undeniable failure—even today—to protect its own workers from known health hazards.

Unless this Congress acts and recognizes the dire necessity for dealing fairly with this national crisis—a crisis which threatens our judicial system with an unmanageable burden—chaos and economic disaster will continue to prevail. Without a legislative scheme such as that presented in H.R. 1626, otherwise successful companies will face the threat of bankruptcy, legitimate claims will be dissipated or go unpaid, many thousands of jobs will be lost, and the courts of our Nation will be innundated by many more lawsuits than those already filed.

I cannot stress too strongly that the time for congressional action is overdue, and that the passage of a bill like H.R. 1626 will apply a strong measure of solution to the national tragedy I have described.

Thank you for the privilege of making this statement. Needless to say, if any Member has any questions concerning my statement, or in connection with this grievous situation, I will be glad to provide additional information.

Mr. **Hollingsworth**. Thank you.

Mr. **Murphy**. Mr. James Storey, coauthor of "Compensation for Victims of Asbestos-Related Diseases: Potential Cost Savings for the Federal Government."

Mr. Storey, thank you for being with us. You may proceed.

STATEMENT OF JAMES STOREY, CO-AUTHOR, "COMPENSATION FOR VICTIMS OF ASBESTOS-RELATED DISEASES: POTENTIAL COST SAVINGS FOR THE FEDERAL GOVERNMENT"

Mr. **Storey**. Thank you, Mr. Chairman. I am Jim Storey, vice president of Chambers Associates, Inc., a Washington, DC, consulting firm.

The subject of my testimony today is the direct impact of asbestos-related disease on the Federal budget. This subject is an important one for Congress to consider as it deliberates on the question of compensating asbestos victims.

I have analyzed this subject, both at Chambers Associates and in a prior position as director of the Urban Institute's Income Security and Pension Policy Research Center. My work at the institute was published in a March 1983 research paper with the title that you just mentioned.

The Federal Government's budgetary involvement in the asbestos problem stems from several sources. First, the Federal courts devote substantial resources to the processing of asbestos-related torts filed in Federal courts; second, the Justice Department and other Federal agencies must commit resources to do the staff work associated with Federal litigation and particularly to defend the United States in cases where the Government is a defendant; third, there is a large threat to the Federal budget from the claims pending against the United States, although the United States has successfully defended itself against liability in asbestos personal injury cases until recently.

Finally, the Government's welfare and social insurance programs provide benefits to many asbestos victims, the cost of which could be reduced if asbestos claimants were compensated.

In my testimony today, I will present what I believe to be the best information currently available on each of these subjects, however, the subcommittee should be aware that data on asbestos victims and the suits they have filed are limited and incomplete, and thus estimates of these budgetary impacts are not as precise as we would like them to be.

First, there are the costs to the Federal courts. Asbestos-related litigation is a major part of the workload of the U.S. district courts and courts of appeal. Not only are there thousands of cases active each year, but these cases are quite costly to handle due to the complexity of the evidence, the time elapse since the asbestos exposure occurred and the multiple defendants many of the cases involve.

In my 1983 Urban Institute study, I made a rough estimate of the annual cost of this litigation to the U.S. courts and came up with a figure of $23 million. Based on preliminary court cost data recently obtained by the General Accounting Office and furnished to your subcommittee staff, it now appears that my earlier estimate may have been too high. The new data were supplied by the Administrative Office of the U.S. Courts and are still under review by GAO and subject to change. However, the preliminary figures indicate a Federal court cost of $10 million for fiscal year 1984.

I think personally that the $10 million figure is probably too low because it relies on an estimating procedure that is used for a broad category of personal injury product liability cases and, therefore, does not reflect the degree of difficulty in trying an asbestos case compared to other personal injury suits.

In my judgment, Federal court costs associated with asbestos cases were probably closer to $13 million rather than $10 million in 1984. Based on forecasts in the budget of growth in spending by the judicial branch and looking ahead to fiscal year 1986, this $13 million cost level would rise to about 16 million for fiscal year 1986.

A large number of the pending asbestos cases involve the United States as a defendant. This fact requires a substantial amount of legal work by the Department of Justice in defending the Government's interests. Other Federal agencies also have staff involved because of the relevance of their activities to these pending claims.

My 1983 Urban Institute paper did not deal with executive branch costs related to litigation against the United States. However, I have since looked into the available data on this subject. In a preliminary submission of data in response to a GAO inquiry, the Justice Department has estimated that it will spend $11 million in fiscal year 1986 for asbestos-related activities. As for the other agencies, I have made my own estimate of their costs based on a detailing of Federal staff resources committed to asbestos litigation that was recently provided by the U.S. Attorney General to the Senate Appropriations Committee.

The agencies involved are the Department of the Navy, the Department of Labor, the Department of Health and Human Services, the General Services Administration, and the Maritime Administration. Based on the materials submitted to Senate appropriations, I estimate that these five agencies together will spend about $2 million in fiscal year 1986 on matters related to asbestos litigation.

The Federal Government has been found liable in one asbestos-related personal injury case, but that case is on appeal. The United States has settled a few cases out of court. But more importantly, the claims that are now pending against the United States are large and are expected to grow to enormous levels over the next few years.

One of the first public acknowledgments of this potential budget threat came in the Justice Department's defense of its fiscal year 1985 budget request. Justice defended its staffing need requests for asbestos cases by arguing that, should the Government be found liable under claims pending, there would be a payout of $152 million based on the processing of 830 claims during fiscal year 1985. We now know that there are many more than 830 claims pending against the Government.

Preliminary Justice Department data obtained by GAO are still being examined, but it appears that the number of pending claims may exceed 100,000 by the end of fiscal year 1985, with a potential dollar value that could total as much as $9.5 billion.

The United States was found liable for negligence in a recent case, *Shuman* v. *U.S.A.*, that is now on appeal. If a precedent-setting court finding against the United States in the *Shuman* case or other pending cases were to lead to a rapid processing of these claims, the United States could conceivably pay as much as $6.9 billion in claims during fiscal year 1986, based on the methodology that Justice used in its $152 million estimate for 1985.

This huge outlay would not end with 1986, however, since Justice expects claims against the United States will increase over the next few years.

The final area I will discuss concerns the interaction of compensation benefits for asbestos claimants with existing Federal benefits. Victims of asbestos-related diseases and their survivors are often eligible for federally funded benefits, in some cases because of the disease's impact on their earning capacity and in other cases for totally unrelated reasons. Therefore, if the Government were to enact a program under which the victims and survivors were compensated, there would be an impact on Federal spending for existing benefit programs.

There are two types of such programs involved: means-tested programs, such as food stamps, SSI, and Medicaid which experience cost savings when a new source of funds is made available to recipients of these programs. Social insurance programs, such as Social Security, generally are not so affected unless Congress specifically enacts an offset feature which deals with a new benefit.

The primary purpose of the 1983 Urban Institute study was to estimate the likely impacts of asbestos compensation on existing benefits. To make this estimate, my coauthor, Sara Hatch, and I had to make an assumption about how such a compensation scheme would work and how many people it would cover. We assumed that a new program would make monthly payments to about 10,000 disabled victims and an equal number of survivors of deceased victims.

We also had to make assumptions about the extent to which asbestos compensation recipients would be eligible for existing Federal benefits and how many would fall into each income bracket. We relied primarily on data reported in Dr. Selikoff's study for the Department of Labor. Because the data on the income distribution of recipients was imprecise, we stated our estimates in terms of minimum and maximum ranges to avoid overstating the precision of our estimates.

In that 1983 study, we concluded that the presumed Asbestos Compensation Program would automatically reduce existing Federal benefit payments by somewhere between $19 and $31 million a year. If the laws were changed to maximize the offsetting of Social Security benefits, we estimated that the annual savings could range as high as $74 to $82 million a year.

Benefit payments are now higher than when the 1983 study was done. Using the same assumptions as in that study, but adjusting those estimates for the 2 years that have elapsed to reflect the higher benefit levels in current programs, I now estimate that the automatic annual savings would range from $22 to $34 million, or $3 million higher than in that earlier study. With a full Social Security offset, the estimated savings would range from $81 to $90 million, using the updated figures.

As I stated earlier, the institute's study assumed a program making periodic payments that would be treated as current income under the rules of existing benefit programs. However, in an asbestos compensation system that provided one-time lump-sum payments, such as in the proposed Asbestos Workers Recovery Act, the offset of existing Federal benefits would be much smaller.

The lump-sum award would not result in a Social Security disability offset, as a periodic payment might, nor would it be considered current income in programs that base assistance on need. However, such awards would probably be considered as financial assets and would eliminate recipients from eligibility in programs that use asset tests in determining eligibility, such as food stamps and Medicaid.

Such programs account for only about one-third of the $22 to $34 million savings that would occur automatically if compensation were paid on a periodic basis.

In summary, the direct costs to the executive branch and the Judiciary of asbestos litigation will total about $29 million in fiscal year 1986. Legislation to compensate victims outside the courts would permit the Government to save or redirect those funds.

Additional savings would be realized in Federal benefit programs, the amount depending on how the compensation is paid. These budgetary effects are small, however, compared to the potential Federal payout to claimants if the United States is required to satisfy the claims now pending.

That concludes my prepared remarks, Mr. Chairman, and I would be happy to attempt to answer any questions that you or the other members of the subcommittee may have.

Mr. MURPHY. Thank you very much, Mr. Storey.

I might ask you, at this time—do you have any financial relationship with the asbestos manufacturers at this time?

Mr. STOREY. Yes. Let me explain that.

Mr. MURPHY. And while you are at it, did you at the time of your involvement in the study?

Mr. STOREY. While I was at the Urban Institute, the study on which I am reporting was done under a contract with the Manville Corp. The contract was negotiated in the same way as other contracts with Government agencies, private corporations and foundations and was conducted on a nonpartisan, objective basis.

After leaving the institute and joining Chambers Associates, the firm began consulting with the Manville Corp. My own role personally while at Chambers Associates has been to give technical advice and provide cost analysis on the kinds of effects that I am reporting on today.

During the first 5 months of 1985, I spent a little under 4 percent of my time assisting Manville with that kind of activity.

Mr. MURPHY. Thank you for that explanation.

In some of your projected costs, obviously the Federal courts have to serve; the judges are there and they are paid their salaries and the clerks and so forth. Do you take that into consideration or are you taking a prorate cost of their salaries and the other standing costs that we have to support the court system anyway?

Mr. **Storey**. The way these estimates of the court costs are derived is, first, the part of the judiciary's budget that funds the types of courts that process these cases is isolated and then a cost-per-case is estimated from that total aggregate cost——

Mr. **Murphy**. Without—excuse me—without those cases, though, wouldn't the costs still be incurred by the Government?

Mr. **Storey**. Yes, they would in all likelihood—one can't say that for certain. If there were no asbestos cases to deal with, then the salaries and other costs of the courts could be redirected to other pressing litigation needs. An economist would say that it is an opportunity cost; that is, the mountain of asbestos cases that the courts are dealing with are taking away the opportunity of using those resources for other matters that may be of high priority to the courts. But you certainly cannot say for sure one way or the other that the judiciary's budget could be cut back by so many millions of dollars in absolute total dollars if there were no asbestos cases to process.

Mr. **Murphy**. It might prevent us from having to put on another 152 Federal judges like we did 2 or 3 years ago.

Mr. **Storey**. One way to look at it is that it could affect the future growth of the budget of the judiciary if the asbestos caseload and the work involved keeps mounting.

Mr. **Murphy**. Mr. Petri.

Mr. **Petri**. Just to follow up on that question, did you do any breakdown as to the kind of hard savings and the opportunity costs or indirect portion of the $29 to $32 million savings, or is it all lumped together? I mean, there is a difference. If it is $500,000 of hard savings and $31,500,000 of opportunity costs, it is pretty soft.

Mr. **Storey**. The amount of money that could be saved in benefit payments is a hard savings, because that would occur automatically once the nature of a new program were known and were in place and operating. With respect to the savings for the executive branch and the judiciary, that would really be subject to negotiations between those agencies and the House and Senate Appropriations Committees because all of those budgets are appropriated budgets. They are not funds that are authorized automatically so that—say, for example, if House Appropriations knows that the Justice Department had been spending $11 million a year to deal with asbestos litigation and that suddenly overnight that were taken away by a new act of Congress, then Appropriations would presumably ask Justice—and maybe OMB would, too, before it ever got to Appropriations—would ask Justice to show ways in which those savings would turn up in their budget. Of course, Justice might well come in and argue that they had other very pressing needs for the funds and justify the funding on some other basis.

So I don't think you can say that *x* percent of the money now going to Justice or to any other agency would definitely be a hard and fast saving if the litigation were ended. All you can say is that there is a great potential for savings there, but it would be up to OMB and Appropriations and the other organizations that review budgets to realize the savings.

Mr. **Petri**. Is this the first study that you did in the asbestos area?

Mr. **Storey**. The Urban Institute study was the first study that I was personally involved in that dealt explicitly with asbestos. Before that, I had been involved for many years in cost analysis and policy analysis of other income-maintenance-type programs.

Mr. **Petri**. You refer to it as the Urban Institute study, but it says that "This study does not necessarily reflect the views of either the sponsoring organization"—which I assume is Johns-Manville—"or the Urban Institute Board of Trustees." Is that correct?

Mr. **Storey**. Yes, I am using that as a term to refer to a study that was done at the institute and published as a research paper by the institute. The language you quoted was the common caveat that we put in all our reports so that the Urban Institute Board, not having reviewed this particular work, could not be blamed for any of the opinions or misstatements of fact or whatever that might occur in it.

Mr. **Petri**. But if we or some newspaper were to call up the Urban Institute and say, "Is it correct to refer to this as an Urban Institute study," they would say, "We don't take any position on the strength of the study. It really was commissioned by an asbestos company that reflects the views of the researchers who did the study." Isn't that correct?

Mr. **Storey**. They would certainly say that the views were the views of the authors. It was reviewed at high levels within the institute, as I recall. The current senior vice president of the institute reviewed it very carefully, and his remarks were taken into account before the final version was published.

Mr. **Petri**. We were trying to search around to see if there were any published commentaries or analyses of this study done by other research organizations or experts in the field or whatever. Are you aware of anyone who has read and written something or has said something about this study as to the weight that should be given to it or its validity?

Mr. **Storey**. I have heard oral comments from people who are interested in this subject and are working on it themselves that they read the report and found it useful. I am not aware of any written reviews or critiques of it.

Mr. **Petri**. Do you recall how much Johns-Manville paid for this study?

Mr. **Storey**. As I recall, the contract was on the order of $25,000, but I could check that and correct the record if that is erroneous. The award was in the amount of $25,000.

Mr. **Petri**. That would have been to the Urban Institute?

Mr. **Storey**. That was the contract with the Urban Institute.

Mr. **Petri**. Now they have a contract with the organization that you are currently associated with?

Mr. **Storey**. We consult with them on an hourly basis.

Mr. **Petri**. Thank you.

Mr. **Murphy**. Thank you, Mr. Petri.

One thing you did indicate that we may be asking the Department of Justice, you stated that they justified their staffing needs for fiscal year 1985 based on the fact that they need additional staff to prevent claims from reaching $152 million. Is that——

Mr. **Storey**. That was the figure they used.

Mr. **Murphy**. That was the figure that Justice used and that was based on the 830 claims then pending in which the Federal Government was part or a party.

Mr. **Storey**. They didn't really state that that was the total number of claims pending. What they said was that if we are found liable in these asbestos cases——

Mr. **Murphy**. If we lose——

Mr. **Storey** [continuing]. And have to pay claims, we will have to decide on 830 cases this year. They estimated that they would have to compensate about 73 percent of the claimants in those 830 cases. That estimate was based on a figure that was drawn from a broader experience with asbestos litigation over the last few years.

Mr. **Murphy**. Where did you obtain that information, Mr. Storey?

Mr. **Storey**. As I recall, that was provided to one of the appropriations committees in a letter from an assistant attorney general. I could provide that cite for the record.

[The information follows:]

The Justice Department estimate of $152 million was explained in a letter dated December 14, 1984, from Richard K. Willard, Acting Assistant Attorney General. The letter was addressed to Senator Ernest F. Hollings in his capacity as the ranking minority member of the Senate Appropriations Subcommittee on Commerce, Justice, the Judiciary and Related Agencies.

Mr. **Murphy**. Thank you very much; we appreciate your testimony and the facts will be very helpful when we interview the Department of Justice.

Mr. **Storey**. Thank you.

Mr. **Murphy**. Thank you. Oh, Mr. Petri.

Mr. **Petri**. Just one final question.

Mr. **Murphy**. Mr. Petri.

Mr. **Petri**. Does your testimony here today count as consulting time with the Manville Corp?

Mr. **Storey**. No, it does not.

Mr. **Petri**. Thank you.

Mr. **Murphy**. Thank you.

We are waiting for Dr. Alter, so we will proceed with the fourth panel: Mr. James Fite, White Lung Association of Baltimore, MD; and Mr. Paul Safchuck, also of that association.

Would you gentlemen take the witness table, please.

STATEMENTS OF JAMES FITE, WHITE LUNG ASSOCIATION, BALTIMORE, MD, ACCOMPANIED BY DAN O'TOOLE, FORMER BUSINESS AGENT OF THE IRONWORKERS, BALTIMORE, MD, AND CURRENT MARYLAND CHAPTER PRESIDENT OF THE WHITE LUNG ASSOCIATION; AND ROBERT RANKIN, LEGISLATIVE REPRESENTATIVE OF THE BUILDING AND TRADES COUNCIL FOR THE AFL-CIO IN BALTIMORE; AND PAUL SAFCHUCK, WHITE LUNG ASSOCIATION, BALTIMORE, MD

Mr. **Fite**. Thank you, Mr. Chairman. With us today is Mr. Dan O'Toole, who is former business agent of the ironworkers, Baltimore, MD, and is current Maryland chapter president of the White Lung Association; and Mr. Robert Rankin, legislative representative of the Building and Trades Council for the AFL-CIO in Baltimore.

My name is James Franklin Fite and I would like to express my deep appreciation to the Subcommittee Chairman Murphy and other House Members and staff for allowing me to present the opinions of asbestos victims, particularly those in the White Lung Association, on House bill 1626, the "Asbestos Workers Recovery Act."

I was exposed to high levels of asbestos through my employment as a carpenter and later as a marine machinist in the shipyards. I live in Baltimore, MD, and I am currently serving as executive director of the White Lung Association and treasurer of the Breath of Life Organizing Campaign which is a nonprofit coalition of the Black Lung Association, the Brown Lung Association, and the White Lung Association.

The shipyard where I worked had a high percentage of those stricken with asbestos-related disease and there is an unfortunate likelihood that I may be stricken with an asbestos-related disease at a later date.

There can be no doubt that the public health crisis which has been caused by the uncontrolled proliferation of over 40 million tons of this deadly carcinogen requires congressional action. It is also clear that such action will set policy for hundreds of other chemical carcinogens which are being allowed to pollute our air and water at a rate that shows birth defects and increased cancer rates in just one generation.

It is unfortunate that the subcommittee has chosen to consider such legislation, which is so corrupted by the influence of the insurance companies and asbestos industry that it fails to serve the millions of Americans which it purports to cover. The bill is misnamed. A more truthful name would be the "Asbestos Industry and Insurance Industry Bailout Act." If you still insist on using asbestos victims in the title, we would suggest the "Asbestos Victims Burial Act."

This bill will eliminate a fundamental aspect of our democracy by crippling the judicial process known as toxit tort. This bill will institutionalize cancer. It is an admission that Congress does not have the heart to stop the contamination of society and will not allow the courts to do so.

The physical results on the population exposed to asbestos are so devastating that Congress is compelled to act, yet their action, with the introduction of H.R. 1626, is designed to increase the misery of asbestos victims; to protect the financial profits the industry accumulated while selling this deadly substance; to subsidize the insurance industry for foolishly insuring a substance for 67 years after it refused to insure the workers who handled the substance. This bill makes a pretense of doing something for hundreds of thousands of victims who were introduced to asbestos decades after the companies' own research showed how harmful it was.

The bill states that when cases go to court, the asbestos victim ends up with only 39 cents on the dollar. It does not take into account that most cases are settled before they go to court. The victims were receiving a larger share of the settlement far in excess of the some 90 weeks of State's average weekly wage. I would point out that before Manville went into bankrutpcy, it had gone to court

BEST COPY AVAILABLE

some 90 times and won 41 of those times. However, it settled out of court 3,344 times.

The bill states that if litigation is allowed to continue, the resources available to pay future disease claimants will now be seriously impaired. These companies do not now have, nor will they have the assets necessary to clean up the pollution and ill health they have caused. They cannot continue to sell asbestos because of the widespread understanding of the harmful effects of asbestos.

Congressional support, for their industry, of selling toxics in order to obtain funds for paying for the damage caused by the sale merely provides insurance for them to continue to pollute.

Congress has expressed concern about the health of the industry and its ability to export. Since when is Congress in the financial subsidy business for sick industries? If you want to bale someone out, why not the steel or shoe business? At least these industries' products do not give us cancer. If the U.S. asbestos industry was curtailed from hawking its murderous products overseas, our country would get a vote of thanks from the world. Congressional action to promote the sale of asbestos products overseas means the export of cancer.

If Congress is interested in admitting to the U.S. Government complicity in the asbestos public health crisis, they could begin to demonstrate their sincerity with a resolution sent to each of the current Federal compensation programs who handle asbestos cases and instruct them to deal with the cases quickly and fairly. The Federal Workers Compensation System, the Longshoremans and Harbor Workers Act, and other systems, including those in the military, are obstructive and inadequate for the asbestos victim.

You could also publish a statement on Government complicity which victims could show judges and juries that our Government has already paid out to victims in asbestos-related civil suits. This could be stepped up, instead of sidetracked, as it currently is.

On page 4, the reasons for industry responsibility fail to note the most important one; that the industry knew and surpressed the information on the serious health effects related to exposure; that they did and continue to sell this substance without proper warning, packaging and defined use; and that they have used every legal maneuver available to them, including lobbying for this legislation, to escape the responsibility of their actions.

In limiting the bill to occupational exposure, Congress will not guarantee the health of the industry. Environmental exposure, property damage suits, will finish off this industry soon. Evidence of this are insider stock reports currently calling for the sale of stocks in companies like U.S. Gypsum due to asbestos-related liability not at all confined to personal damage from occupational settings.

This bill will only prolong the agony for a society who eagerly awaits the death of the asbestos industry and the banning of asbestos. The failure of State workers compensation systems are part of the reasons that drove asbestos victims to third-party cases. In any event, the liability of the manufacturer is a separate matter from the liability of the employer who used the asbestos.

Workers in the Southern States traditionally have had State compensation systems which provide lower rates of benefits than

Northern States. State compensations systems are not standardized, some having medical boards for occupational disease and some not.

This bill would provide nothing for someone who could not show decreased earning capacity. Earning capacity is not all there is to life. The asbestos victim who is lucky enough to continue working should not be discriminated against. Anyone who is familiar with asbestos-related disease knows that an individual can continue to work, even with discomfort, as the disease slowly kills them.

The bill will act as a supplement to the existing programs with a maximum of benefits amounting to 2 years of weekly payments which equal the State average weekly wage in the State where the claim is filed. Yet the bill curtails many State compensation practices which favor the victim. Most States allow for a restructuring of benefit payments on less than 20 percent increase in condition.

Most account for physical deterioration in addition to financial deterioriation of the victim as basis for benefit increases.

Page 25 of the bill states that this trust fund would only be funded to the extent authorized under this title. In reports to the U.S. Government, Dr. Selikoff made a conservative estimate of 10,000 asbestos-related deaths each year. There are over 25,000 living individuals who currently have claims resulting from asbestos exposure.

If each of the 35,000 cases were paid $10,000 in supplemental benefits, the fund would be broke in 6 months. If average weekly wage was estimated at $300—and I use this estimate because as we were preparing testimony on Mr. Hart's bill a few years ago, we had to look up the national average wage—the total payout allowed by the bill is approximately $28,000. The average State comp benefit for asbestos victims is about $14,000. The supplemental benefits would then require more than $10,000 per average.

These estimates illustrate the inadequacy of the fund. One company, Manville Corp., has already offered $300 million or more to the Bankruptcy Court in New York, yet Congress is only asking $150 million for the first year from all the defendants. State compensation systems frequently extend the statute beyond 2 years and this bill needlessly restricts it to 2 years.

Several years ago, I had the opportunity to speak before a Senate Committee on a related matter. At that time, I submitted documents prepared by the First and Second Congresses of Disabled Workers. Included in these documents were hundreds of examples of discrimination and failure of the Social Security disability system. This was during the time the elements in this agency were attempting to decrease the roles of recipients and hundreds of thousands of workers, many of whom were restored later to benefits through court action, were being cut off.

Page 28 states that the general procedure will be to rely on Social Security review mechanisms. No one on the receiving end of these mechanisms regards them as fair. Certainly they are not more fair than a jury.

On page 30, the bill speaks to the Secretary-approved plans for State agencies which will make determinations of eligibility. This is similar to a structure which currently allows State plans to regulate asbestos provisions for OSHA and EPA. This planning has led to an inequitable level of regulation in different States and would most assuredly do so in developing regulations for assessing asbestos-related health claims. In addition, some State compensation systems are different in determination mechanisms and amounts paid.

It would also appear from reading section C on page 30 that the States could dump the entire payment on the Federal supplement by holding up claims past a timely period. Since the average weekly wage in each State is different, the provisions of this act discussed on page 32 encourage States to lower the amounts paid on asbestos claims in order to increase the Federal subsidy.

This bill will reinforce and encourage the States to drive wages down; it will reward and subsidize those States which have low wages; and will indirectly encourage nonunion environments.

Throughout the history of Government regulation of asbestos-related health problems, Mount Sinai Medical Hospital in New York City has played a very prominent role in congressional testimony, investigations and reports on this situation. Why have they been left out of the construction of the medical panel? Why does the bill allow for a medical panel without specifically calling for "B" readers? It should be noted that the bill is 95 pages long and only about one-third of those pages are devoted to compensation systems for victims or even discusses victims. The remaining two-thirds of the bill discusses the organization of the law as it affects those whose work is a result of the asbestos victims' tragedy: the lawyer, the insurance representative, the compensation system employee, the doctor and the lobbyist.

While the bill is careful not to create another bureaucracy for asbestos victims, it works overtime in creating trust, medical boards, insurance courts and other special-interest bureaucracies to speak to the participation of those elements who wish to limit and hinder justice for asbestos victims.

If Congress is interested in creating a special court in the District of Columbia, we invite them to create one for asbestos victims who have toxit torts. Let us get to a jury in 180 days and we will have our compensation. The original asbestos defendants, as the bill calls them, have never come to an agreement on who is responsible for what. This bill would encourage them not to come to such an agreement.

On page 51 of the bill, they are directed to come to agreement. In case they don't, they will be able to take their case to this special court. Does Congress really think this process will not drag on for several years? This bill acts as a huge Federal insurance umbrella for anyone who seeks protection from toxit tort action resulting from asbestos.

It is even more outrageous when the bill proposed to make all payments and expenses regarding such court action tax-deductible. This direct subsidy and protection to the very industries which are responsible for the pollution of society can only encourage them to do so more often and more generously.

The bill is not clear as to what is the liability of the industry should the trust fund go bust. I am sure the industry is going to claim that the bill protects them from court action. Where will the victims go? Back to court to determine if they still have court rights.

The bill would propose the payment of supplemental benefits to those awaiting third-party action results, provided there is a lien upon the payment of any amount of recovery by the affected person as settlement or judgment in any claim or civil action. This is a setup for the victims. There are thousands of victims who have received their State compensation, generally under $14,000, and who await the results of civil court action. These results are being stalled due to the legal maneuvers of the industry with the judicial and legislative branches of Government.

These victims are slowly being financially strangled by the compensation system, just as they are being physically strangled by the asbestos fibers. If this bill passes, many of them will be forced to apply for supplemental benefits in order to live. The passage of this bill, and the resulting activity of the victims in applying for benefits, would direct the later court-won benefits into the trust, where they would offset future payments from the industry.

In short, the bill would allow the industry to utilize court-ruled payments for their trust fund payment. In addition, it allows the industry to shift the payment of attorneys' fees onto the back of the trust fund.

True to form, the bill provides only one of the five positions of public members on the trust fund committee to be effected persons and other claimants. The other members, including one representing the asbestos defendants, one for the insurance industry, one representing employers of workers who suffer from asbestos-related diseases—this three being the majority—are charged with such tasks as who will be assessed and how much. In addition, they will authorize the managing trustee to award grants and contracts to eligible organizations who are funded to carry out aspects of the law.

These three asbestos-related financial interests can completely structure the working of the law. These are the same elements who have fought the needs of asbestos victims for decades. What assurance does this subcommittee have that the practice of allowing the fox to guard the henhouse will work for the first time in history?

Collective-bargaining agents, as well as consultants, are protected from asbestos-related liability due to occupational exposure to asbestos.

On page 88, the bill states that "the restriction on remedy under this subsection (a) shall apply to all actions pending on or commenced after the effective date of this act. For such purposes, an action is pending if it has been commenced and not yet been terminated by final nonappealable order or judgment." The inclusion of this statement in the bill, even as the bill is being considered, will slow down present court action. If passed, it would wipe out the rights of thousands of asbestos victims who presently await court judgments.

Further, it will allow defense firms to automatically appeal every case they can to stretch out the court decision until their relief bill, H.R. 1626, can be passed. This has the effect of giving congressional encouragement to the industry to continue to use stalling tactics in the courts.

Section 302 states that the act is null and void if ruled unconstitutional. I cannot help but predict that asbestos victims would challenge the constitutionality of this legislation. Thus, the bill is forcing more court action, more lengthy delays to the civil process now used in conjunction with State and Federal compensation systems.

In summary, I feel this bill should be withdrawn. It is an obvious handout to one of the major, if not the major, polluter of our country. It fails to recognize that State compensation systems are woefully inadequate and that asbestos liability is not, nor will it be, restricted to occupational exposure cases. This bill will institutionalize cancer and legitimize the pollution of our society by the uncontrolled use of toxins in the workplace.

More important, the bill excuses and endorses a sick, and some believe, a criminal industry. It provides insurance for bad decisions of the insurance industry. While Congress allows the farmers to go broke, the inner cities to die, the schools to wither, no food for hungry children nor shelter for the homeless, water projects to dry up, they have chosen to save the asbestos industry and its insurance companies.

Thank you for hearing our views. We would be willing to answer any questions that the committee has. Finally, we would be quite willing to assist the subcommittee in creation of a suitable solution to this problem once this bill is withdrawn.

Mr. **Murphy**. Thank you.

Mr. Safchuck.

Mr. **Safchuck**. My name is Paul Safchuck. I am the president of the White Lung Association and I am appearing here on the injustice and inequity and dangers of H.R. 1626 given before the House Committee on Education and Labor's Subcommittee on Labor Standards.

My name is Paul Safchuck. I am from Baltimore, MD. I am a national president of the White Lung Association, an organization that represents thousands of asbestos victims in the United States and is respected at home and internationally for our knowledge about the asbestos hazard and our concern for the rights of those who have been exposed to and diseased by asbestos.

First of all, I want to thank the Representatives, Mr. Murphy, and the committee, for letting me appear and speak on behalf of the victims of asbestos and future victims and their families. As president of the White Lung Association, on H.R. 1626, which I am against and every victim that I have spoken to considers this bill out of order, the so-called Asbestos Workers Recovery Act.

It will be clear to you when I have finished testifying why I think that those persons who have sponsored this bill should either withdraw their names from the sponsorship or rename the act either the Asbestor Workers Rejection Act, or the "Asbestos Companies Recovery Act."

Now I am going to give you a little history on me so you will know the kind of person I am and the kind of people I am here speaking for. I left home in the early part of 1934, which I lived in the southern part of Pennsylvania, Westmoreland County, traveled around the country looking for work. At that time, it was hard to find work.

I traveled for over a year before I finally got a job with Bethlehem Steel in Sparrows Point Shipyard, Sparrows Point, MD, in June 1935. I worked there for about 40 years.

I am now retired and am a victim of asbestos. I have what is called asbestosis. The doctors have told me that there is nothing they can do to help me. I have already spent thousands of dollars to treat the medical problems that go along with my disease, and that is one of the reasons I am going to bring something up. When you talk to me, talk a little loud because I no longer have money to fix my hearing aid, so I am without hearing aid because due to the medical problems I have here. It goes with the disease. I can look forward to a slow and painful death from asbestosis and a 50-percent chance of getting lung cancer.

If my doctor bills, like those of my fellow shipyard workers, are a burden. I can expect the cost to my family to be in the neighborhood of $100,000 or more before I die I have experience because my father died of black lung and it made us completely broke. I am just beginning to recover. So I am pretty well experienced on that.

I am a member of the Sparrows Point Shipyard Retirees Association of Maryland, a member of the Baltimore County Association of Retired Persons, and an honorary, paid-up life member of the Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO. I am also a member of the AARP, which is a national retired organization.

But this is enough about me. The most important thing about me and the people like me is that I am against this bill you have here, the H.R. 1626, and as I go on speaking, you will see why.

First of all, I think you have been greatly misinformed about the asbestos and the problems it has caused and will cause. It is hazardous and you seem—the committee seems to think that the problem of asbestos is just the one industry, the shipbuilding, but it is not because you have as much or more of a problem with asbestos in other industries and other places, such as building industries, transportation of all kinds, factories and all kinds of industries.

Asbestos was and is used in many ways. It is used in public and Government buildings, homes, home appliances, schools, food processing, filtering of different kinds of beverages and in many other things. So it does not only cover the shipyard worker. It covers the good old U.S.A. totally. Everybody, including you.

I would like to tell you of just one area which you ignore completely. I am going to talk about the asbestos in the schools and how we are abusing our children with asbestos by sending them to asbestos-contaminated schools. I believe in good education and I do not believe in abusing children with asbestos to get that education. That is exactly what we are doing when we send them to asbestos-contaminated schools, and according to the Government statistics, 75 percent of our schools are contaminated with asbestos.

Yet, we make the children go to these schools and I think that this is one of the worst kinds of child abuse that we have. The Government estimates show that there is going to be 243 children who are going to die early deaths out of every 100,000 that are exposed for just 5 years at even the low levels of asbestos we have in the schools and they say there are 15 million children each year exposed to asbestos. So you see, children are very important because that is the future of our country. We were children one time, too, let's not forget that. Today, we are running our country and our children are going to be running our country when we are through.

So they are very important and we should—there is nobody protecting them or having anything to say, so that is why I am stepping in at this time to help children like him—indicating—and everybody else; that they have a right to express, and I am expressing that right for them.

That is not saying anything about the school personnel, such as teachers, principals, custodians and other school workers. Right here, I have a letter of a gentleman by the name of Irving Taylor, who worked in the Baltimore schools. He is so bad off, he wanted to come to this hearing, but he is too sick because he has asbestosis. So he gave me this letter and gave me permission to use his name to let you people know that this stuff is not only a shipyard problem. It is also in our schools and other industries.

Mr. **Murphy**. We will be very happy to make his letter—a copy of the record, if you desire, Mr. Safchuck.

Mr. **Safchuck**. I was told that you can make a copy, but I have to take it back because that is his personal record, doctors' records and stuff. I will let you make copies of it.

Mr. **Murphy**. Thank you.

Mr. **Safchuck**. Your bill doesn't even recognize that the asbestos victims have families and that their families are victims of asbestos, too, in many ways. I want to tell you something about the victims' families and how a family can be affected by asbestos at home.

One way the children and wife can be contaminated is from someone working around asbestos who brings it home on their clothes. We have white lung members, victims, whose wives and children have been told their lungs look like they worked in the shipyards, same as my lungs. I will tell you, many times I came home from work and my children would run to meet me and I would have it on my clothes, and you know how children run and grab you and they get their mouth and eyes and nose full of asbestos.

This bill doesn't cover that. It doesn't even say anything about that, and yet, they are victims of asbestos. We should consider those circumstances, too. That is why I am trying to tell you this bill doesn't even cover anywhere near because when it first started with shipyard workers, we noticed it first, but today it covers the whole nation. We even had people call right here from Washington, DC., who work in these buildings. Your Pentagon building is contaminated with asbestos. We have people that call here asking the White Lung Association for help because they got asbestosis while they have been working here.

Another way is from asbestos used in construction of the home, such as insulation, all kinds of plasters on the walls and ceilings and asbestos floor tile and shingles on the houses. So you see why I say this bill, H.R. 1626, is no good to the victim or their family because it does not cover all the problems asbestos causes.

This bill does not consider those people that asbestos can affect who do not work with it, but are victims of asbestos anyway. But that is only part of it.

I will further try to explain to you why this bill does very little to help the victims or the family because the compensation it provides does not even begin to come close to helping to pay the doctor, hospital or medical bills that are the result of asbestos contamination, let alone providing compensation for the taking of a person's life, which I think is criminal because they knew all about it.

Prior to that, even before I started to work, nobody told me, yet they knew back in 1935, when I started, that asbestos was dangerous and should be curtailed, but nobody told me anything about that. These medical and hospital doctor bills can come to $100,000 or more.

This bill makes the victim's life so cheap and the miseries that the victim or their family endures is worth nothing, according to you people. Yet you people worry about those big rich companies going bankrupt for something that they knew about already. They knew that they might some day have to pay for it, but they took the chance anyway. But they did not give me a chance to have anything to say about the miseries I have to endure or about what would happen to my life.

They could have corrected these things. They did not because it would have meant less money for them. I have a right to some of that money they made by making my life and my family's life miserable by shortening my life span. Right now, I have a tremendous bill due to my wife—she has a nervous breakdown worrying about me and my asbestosis. She worries every time I go out or anything else and she is totally, completely, almost—I am going to have to—if she keeps up, I am going to have to put her away. That is how asbestos affects families, other familes.

I can give you examples of other victims where it affected the family, not exactly the same as mine, but in other ways.

The manufacturers did not let me or hundreds of thousands of victims like me have a chance to say anything about this problem when they were developing this problem for all of us. The manufacturers of asbestos caused this problem on their own and they should be made to correct the problem and pay for the damages, not the victims or the public, and if the insurance companies insured them, then it is their fault and not anybody else's. So they are responsible, just like the manufacturers.

What you people that sponsored this bill should do is go out and ask the victims themselves and see and hear their needs once, which I have already done. I have already been out with people—to bed—where they were bed-ridden. I have asked people now that I can't even get anybody to go along with me to see these people because it is so terrible. I tell you, it makes you sick in the stomach to see these people dying with cancer which could have been stopped.

You haven't even thought about how the victims and their families are suffering from the asbestos contamination. You must have only talked to the asbestos company executives about that bill, about the asbestos victims' needs because they are saying you are writing a bill for the people you don't even know about.

I can see that you haven't done this because you do not know until you go out and see these people and see for yourselves. I have done this because I am one of the victims myself and have seen many. Many of the people I know and work with every day. This bill helps the manufacturers of asbestos and their insurance companies and the manufacturers of other hazardous material more than it helps the victims.

In fact, by this bill, it will not be holding the manufacturers of asbestos or their insurers responsible for the problems they have caused by asbestos. You are just going to be making sure that they just keep on contaminating the people. It means a couple of bucks for them.

Before I finish today, I would like to make some comments on some of the parts of the bill that worry me most. This bill only gives benefits to the people who can show a permanent loss of earning capacity. This is much different and much worse for the victim than the way it is now where the courts allow you to recover based on the evidence that you have the disease.

It says nothing about being able to recover because of your increased risk of contracting future disease. Retirees wouldn't lose earning capacity if they were already on pensions, so they couldn't recover anything. They are the ones who are most at risk of getting sick.

What you are saying in this bill is the only thing you could be compensated for in the bill is for your current ability to earn money and that means that if I am retired, regardless of how sick or how much I spend on my disease and my problems, according to this bill, there is nothing I can collect. I would have to earn money because my pension does not come under me being sick. I would be getting my pension, but just the same, I have spent money—which I am on pension; I am retired—and I have spent my money so now, like I told you before—I can't even get my hearing aid.

Another thing, you say in this bill that once it is a law, it will be the only way that the worker could choose to go to get compensated. Now I have to ask this: If you are really so sure that this is such a good system for compensating us, why don't you let us decide if we want to use it? We can decide for ourselves because if you take away our rights to use the courts around this question, you have taken away one of our basic rights as American citizens.

The third thing that worries me is that you are just creating another Federal bureaucracy here. You say you want to help the workers get quick and fair compensation. More Federal bureaucracy is exactly the way not to do this. It is going to be a mess if you set it up so that the administrative law judges who hear Social Security disability awards will also be hearing asbestos disease claims.

I will tell you from experience, it isn't very fun because I have gone through that. I was injured and I got a busted back and I went through that and that is a job. That is a prolonged, stretched out—it took me 3½ years to get that settled.

We are really going to have a mess on our hands. Diseases and disabled workers have learned a lot from what happened to the black lung benefits and that was a disaster and now you want to do more of the same to the asbestos victim.

This means that the asbestos disease would only be compensated where standard risks of certain types—I think I skipped a page here—did I or did I not—yes——

Mr. **Murphy**. We have to go into session at 12. Could you condense the remainder of your testimony for us? I hate to push you like that but we will be getting bells very shortly.

Mr. **Safchuck**. I have got 1, 2, 3, about 4 pages here that I——

Mr. **Murphy**. We will certainly admit your entire prepared statement for the record if you could summarize it for us.

Mr. **Safchuck**. The thing is the bill, as far as the victims are concerned and I have contacted quite a few victims because I keep in touch—I have yet come up with one victim that they said this was the bill they want. The victim is all against this bill because it is not helping them in any way. It is not compensating—it is making their life cheap. You only allow so much for asbestos—death of asbestos. Do I have to wait to get $15,000 to die? I think my life is worth more than the $15,000. I know you think your life is worth more than $15,000.

Besides, I have to suffer for—I have been suffering for 3 years now. I don't get compensated for that. That is another thing.

There are quite a few other things that bother me, especially the children. There is nothing in this bill about the children, how they suffer. As a parent, supposing something happens to you, your child is depending on you. Yet, this don't compensate nothing. That is how—it is forgotten. This is something over the dam, as I say, like water over the dam. When a father is gone, the children are gone, too. They are forgotten.

The white lung motto is "Justice Today for Better Health Tomorrow," which I have here a poster and I would like to present it at this time. This one here, it says, "Justice Today for Better Health Tomorrow." That means—tomorrow means this little boy here (indicating) or that boy back there (indicating) or your child or anybody else's child. Have we considered anything about them? Not a thing, not in this bill. Nothing compensates them or anything that they have a right to see that they have an education or have a right to health. The way this bill is wrote, their life won't be worth a plug nickel. That is my estimation.

Since you want—have I got any more time?

Mr. **Murphy**. Yes, I think what we would like you to do is direct both of your times to the questions we might have instead of some of your other experiences.

[The remaining statement of Paul Safchuck follows:]

Remaining Statement of Paul Safchuck, President, White Lung Association

Now, this bill is bad enough for the victims who haven't filed any suits yet, but I'm worried about the fact that you are making this bill retroactive. That means that all the lawsuits pending would have to come under this process, and people would have to refile claims even if they were ready to go to trial. If you did this it would just say to all those manufacturers who have refused to negotiate fair settlements with victims all this time that you are going to reward them.

A final thing that makes this bill unacceptable, not only to asbestos victims today, but to all who are in danger of being victims in the future is that if you pass this bill your will be making the spread of cancer an acceptable part of the institutions of our society. Asbestos companies and insurance companies could just figure out what money they are liable to have to pay for the disease and death they cause and keep doing business in the same old way. And if a person had one disease, say heart disease, they would have no right to get compensated because the asbestos manufacturer gave them asbestosis or cancer on top of it. This is against a basic tenet of American justice, that a wrongdoer must be made to pay for his actions.

This bill only applies to "occupational exposures." Well, what about the guy who worked at a lot of trades during his lifetime, or who just changed brakes at home, or did sheet-rocking with asbestos joint compound. They are also affected and they are victims too. Would this mean that asbestos disease would only be compensated if it were of standard risk of a certain type of job. And if that is what you are saying, thousands of potential victims, like teachers, would be excluded since their disease would come, not from their occupation, but just from the fact that they worked in a building with asbestos insulation.

What does this bill mean by "functional impairment" anyway. That will probably be argued for years in the court. Does this mean you can get compensated for reduced pulmonary function or only if you cannot perform work? And I am worried because this bill says you could only get additional compensation if your disease got worse by 20%. Well, I never heard of a workmen's comp case that kent you from getting an award for a worsening condition.

And I'd also like to know what your're going to do if it happens that he asbestos manufacturers and the insurance companies don't pay enough money into the fund to keep it going. If the trust fund fails, those insurors and manufacturers are going to be able to say that they don't have any more liability. They will get off scot free.

Another thing wrong with this bill is that the only people who could claim benefits where the victim had died are the spouse or child. Now why isn't someone paid for this death, even if the victim only had a brother or a sister or his parents alive.

Now, you are telling us that this bill would replace the tort system and you call it "arbitrary, inefficient and tardy". Well, what are you comparing it with. Cases are tried on their merits or settled on what people feel would be a jury's decision anyway. I personally don't believe this is "arbitrary". I always felt that a jury trial was one of the best things about our American system of justice. You say that "expensive tort litigation" could be avoided. But actually, more cases are settled out of court before a civil trial than before a workmen's compensation hearing. In fact, the only way workmen's comp cases pay at all is if they go through a full-blown hearing. You say that the workmen's compensation system is wonderful, but you never tell us why. From the experience of those of us who have ever had to turn to that system for justice, I can tell you that because of having to prove total disability, it is almost a useless system to asbestos victims.

Also, setting a two year statute of limitations is another blow to victims. In Maryland you can begin an action within three years of when you know, or should know that you have an asbestos related disease. And Maryland isn't the only state that has this. And when you say that you can only claim when you show functional disability, no one is going to be exactly sure when tha is. This is going to make it much harder for victims to file claims.

As you can see, I have looked at this bill very closely. I have other concerns, but I won't go into them now. Just let me say in closing that I find it difficult to accept your assumption that the financial health of the asbestos manufacturers is something that we should be just as worried about as about our national security. The mass suffering they have caused should pose a threat to their finances. You have no idea of how many families have gone bankrupt and lost their homes, not to mention their lives, because of them. When you set up artificial protections for them you help them but you hurt the health of the American people, you go against everything our justice system stands for and you, in fact, are the ones that are endangering our national security.

The White Lung's motto is "Justice Today for Better Health Tomorrow." We hope that our comments will help you to see how you are hurting the American people with this bill. We are asking every representative who mistakenly sponsored this bill to withdraw his or her name from it. We are asking you to discuss and work with the White Lung Association and the Breath of Life Organizing Campaign, which we are a part of and which represents the Black Lung Association and the Brown Lung Association, too, and with all other organizations of disabled and diseased workers to work out a just way to compenate the victims of industrial disease and in this way make a big step in the direction of preventing it and preventing the cancer epidemic.

Thank you very much.

Mr. **Murphy**. I know you are familiar—you say you are from Westmoreland County?

Mr. **Safchuck**. What is that?

Mr. **Petri**. You were from Westmoreland County back in Pennsylvania. Where were you born?

Mr. SAFCHUCK. I was born in New York City.

Mr. MURPHY. Oh, you were born in—then you moved back to——

Mr. SAFCHUCK. I was born in New York City, raised in Pennsylvania, Westmoreland County, PA. My father was a farmer/coalminer.

Mr. MURPHY. What year were you born?

Mr. SAFCHUCK. I was born in 1913.

Mr. MURPHY. 1913. You are not one of the notch babies, Social Security, we are worried about these days, then?

OK. I am sure you are familiar with the black lung program—

Mr. SAFCHUCK. Right.

Mr. MURPHY [continuing]. Where the law provides for widows' benefits, dependent children benefits and medical benefits in a monthly payment. If those matters were contained in the white lung benefits legislation, what would your impression be?

Mr. SAFCHUCK. I would reject it because, as a black lung knowledge, they are reduced to practically anything—when my mother died, her black lung benefits could never keep her. We had to keep her. So you see, the benefits under the black lung are not sufficient to keep the family going afterwards. That is from experience that I know that happened in my family.

Mr. MURPHY. However, at that time, she did not have dependent children, I would assume.

Mr. SAFCHUCK. No, she did not, but anyhow, it didn't give her enough because we had to supplement from our pay, from our money, to help her to live decently under poverty because there wasn't enough money from Social Security for her to live decently and have her doctors. She had problems, too.

Mr. MURPHY. What year did she die?

Mr. SAFCHUCK. Now you got me. It has been about 4 or 5 years ago.

Mr. MURPHY. OK. Now——

Mr. SAFCHUCK. Those kinds of things about deaths or anything like that, I try to keep that away from my mind because I watched my father die and I don't want to think about it.

Mr. MURPHY. Have you applied for benefits under your State of Maryland compensation plan?

Mr. SAFCHUCK. No. I am retired, therefore, I get a pension and Social Security. That doesn't—there is no way I can be compensated.

Mr. MURPHY. No way you can be compensated. Have you filed a suit for your asbestos claim?

Mr. SAFCHUCK. I have a suit against the asbestos manufacturer, yes, but there is a victim right here that could answer your question because he is a victim. He is an ironworker and he is not retired. He is trying to get compensation now on that problem.

Mr. MURPHY. And he is—you are still working?

Mr. O'TOOLE. My name is Daniel O'Toole. I am an ironwoker. I am a former business agent of the Ironworkers Local. I submitted written comments to your secretary. I don't think that she has had an opportunity to reduce it or produce it.

I have already been subjected to almost a mirror image of the program that you are suggesting under this bill. Maryland's workmen's compensation system did have a medical board incorporated

BEST COPY AVAILABLE

into the compensation system there. I was—I did file under the Longshore and Harbor Workers Act and the Maryland system and I have timely filed.

I was laid off in 1974 which was, you know, 10 years ago and I, as of yet, have not received any benefits. During this time this medical board process, Bethlehem Steel Corp., which was my employer, destroyed my medical records—that is a matter of record before the Maryland Workmen's Compensation Board. They did this to approximately 1,500 employees, and that is a 25-year, in my case, a 25-year medical history that they destroyed in order to facilitate fighting of the workmen's compensation bill.

I—as I said—I have not received any benefits. I believe that the system itself is subject to corporate abuse and arrogance on the part of an employer that you go before—in this particular case where we are going to a medical board—the medical department of Bethlehem Steel Co. also furnished the medical doctor that comprised one-third of the three-member board. The other medical doctor came from Allied Chemical Corp., who also was a former employer of mine, so we are saying that these doctors should read or be the judge of what their past medical practices were.

It is ironic that the doctor that made the original diagnosis in my case of asbestosis is now the medical director of Bethlehem Steel Corp. So it is a catch-22 thing that we, the victims of asbestosis, are being subjected to. Like I said, this bill here is a mirror image of what already has been for 20 or 25 years experienced in the State of Maryland.

The Maryland Legislature, which I had an opportunity to appear before, as you have given me the opportunity to speak here, in their wisdom, they saw that this practice should be discontinued and they abolished the medical board in the State of Maryland. This was 2 years ago, so now whoever the people are that orchestrate these things, it seems that they are making an attempt through your committee to legislate on a national basis what they have already disposed of in the State of Maryland.

Mr. MURPHY. OK, I thank you and, if you have submitted your statement to our office, we will make copies and submit it for the record.

[The prepared statement of Daniel O'Toole follows:]

PREPARED STATEMENT OF DANIEL O'TOOLE

Dear Member of Congress:

As advised by Chairman Murphy, I am making this written response in lieu of oral statement that is precluded because of prior allocation of time for this hearing on June 11, 1985.

House Resolution 1626 does not correct the outrageous abuses that are at presently being used to deny victims of asbestos a fair procedure to receive compensation for their disease.

I am one of the few living victims of this disease who has been laid off because of pulmonary dysfunction in 1974. Although my employer, Bethlehem Steel Corp., did have prior medical knowledge of this impairment his solution to this problem was to lay me off for insufficient suitable work. In addition, by corporate order they destroyed all medical records of 25 years of medical history.

They have avoided all responsibility and penalties included by reference in (Niosh)—"Weshap"—"E.P.A." and "O.S.H.A.".

They have been allowed to practice this deceit and deception and in some instances conspire to hide evidence and deny benefits to victims in the State of Maryland.

This is made possible by the very same procedures that H.R. 1626 wishes to make into the Law of the United States.

If adopted this bill encourages the abuse and violation of every Health and Safety related Statute that are part of Federal Regulation simply because it will be cheaper to not comply.

A person need not read past the opening paragraph of this H.R. 1626 to be confronted with "prompt" as in most workers compensation literature referring to state law and federal programs. I am or have been part of this administrative procedure for the past 5 years and counting.

The next word is "exclusive" the question here being if H.R. 1626 is attempting to place a Statute of Limitation on the Bill of Rights.

In my case the destruction of my medical records by my employer does not contribute to a fair hearing before any Medical Board or Administrative Judge. If "exclusive" is part of the introduction, I lose my rights to appeal to a State or Federal Court for due process.

The next word is "equitable compensation". By any use of the various forms of calculation the top figure I can arrive at is $50,000 as per this bill.

I ask this committee if they believe that I should forego what tort relief in the form of compensation for 10 years of unemployment, physical and mental suffering of myself and my family, loss of earnings and possible second, partly exposure due to my inadvertently and unknowingly bring this asbestos fibre home on my workclothes.

Section 2 worries about the backlog of cases and the growing caseload of the Courts. This is a true ordeal that is suffered by the victims and their surrounding dependents. It purports to relieve this by introducing the very same administrative procedure on a national level that after 40 years of existance and experience in the State of Maryland was acknowledged to be a conflict of interest and an outrageous abuse of the workers in the state.

It was then overwhelmingly disbanded by the Member of the Maryland Legislature and as required for a Medical Board to rule as part of the workmens compensation system was stopped.

My experience with this type of Board in 1981 placed me in front of 2 Doctors on a three Member Board who were part of the Medical Department of Bethlehem Steel Corp. and Allied Chemical Company which also were places of employment in my worklife. They were then to evaluate whether their x-ray diagnosis was correct as members of this Workmen's Compensation Medical Board. You are now asked to support a National Medical Board in H.R. 1626.

There is no mention in this bill of the logjam in the courts caused by the abuse of the Bankruptcy Laws by corporations seeking to delay payment to those persons to whom they have caused injury with their products and by those who also seek the protection of the Bankruptcy Courts even though they are admittedly not bankrupt.

I had the privilege to appear before the Maryland Legislature and a committee with the same stated purpose of worker protection as this bill claims.

The Maryland Legislature disbanded the Medical Board in 1983 and I hope that this committee sees the wisdom in not allowing this farce as a benefit to be incorporated into any program that is proposed before this body for consideration.

Mr. MURPHY. We appreciate that information on the State of Maryland and we will check out with them what they have done with their compensation. We are trying to make a study of the various compensation laws around the country as we lay this bill before us for markup.

Mr. Petri has gone to answer the bells.

I thank you very much and I am sorry for the shortness of time, but we do have two more witnesses. Thank you very much for your testimony.

Mr. Samuel Roth and Dr. Harvey Alter, with the U.S. Chamber of Commerce.

STATEMENTS OF HARVEY ALTER AND SAMUEL ROTH, U.S. CHAMBER OF COMMERCE

Mr. ROTH. Good morning, Mr. Chairman, my name is Samuel Roth. I am associate manager, employee relations, at the U.S.

Chamber of Commerce and staff executive of our Council on Workers' Compensation. I also edit our annual publication, "Analysis of Worker's Compensation Law," which you will be receiving copies of soon.

With me is my colleague, Harvey Alter, who is manager of our resources policy department and also staff coordinator for the chamber's ad hoc National Business Council on Injury Compensation. Dr. Alter is a chemist by training.

Before proceeding with our statement, we request that our entire statement be made a part of the hearing record.

Mr. MURPHY. Without objection, it shall be admitted.

Mr. ROTH. Thank you.

We will be brief this morning. The chamber has long supported a provision of adequate and equitable compensation for occupationally caused disability through a sound State workers' compensation system. We also support an equitable product liability tort system for the protection of the general public.

Occupational disease is a serious, societal problem, although there is considerable disagreement over the dimensions. Workers have become ill, and in some cases, died as the result of exposure on the job. Our members, all of whom are employers, are concerned with the health and safety of their work force and the need for a fair, cost-effective workers' compensation system for disability arising out of and in the course of employment.

For some of our members who are manufacturers or producers, product liability and tort litigation resulting from workplace asbestos exposure has a catastrophic potential of bankruptcy. Others who are insurers face payments on policies based on premiums that did not anticipate present losses. Moreover, employers, manufacturers and insurers are concerned that work place exposure to other substances could lead to health effects not recognized at present.

Of course, occupational disease can be costly for workers and businesses alike. A fair system of compensation is needed and at present, workers' compensation and product liability are the two principal systems that protect workers who develop occupational disease. However, their adequacy, equity and efficiency have been sharply questioned.

Admittedly, both systems have flaws, but we have a judgment that they are fundamentally unsound and we are committed to making improvements in them. Moreover, we do not believe that any deficiencies in workers' compensation are responsible for the product liability problems and we question the need for changing the nature of the State compensation programs in response to such problems. Furthermore, we strongly oppose Federal programs designed to replace, supplant or supplement State workers' compensation.

In recognition of the asbestos problem, as well as other product and environmental exposure problems, the chamber has recently taken a significant step to seek and recommend new policies and methods for dealing with exposure of workers and others to toxic or potentially toxic substances and any related disease or disablity resulting therefrom.

Modern times, we believe, require modern approaches and that is what we believe we have accomplished through our ad hoc National Business Council on Injury Compensation. Dr. Alter will follow my remarks informing the subcommittee of the findings contained in the just-released ad hoc council's report.

As the record clearly demonstrates, workers' compensation has proved to be a reasonably efficient method of protecting employers and their employees against the financial risk of job-caused disabilities, while motivating job place safety and promoting the rehabilitation of injured workers.

It is important to note that it is premised on a quid pro quo in exchange for certainty and promptness in receiving full medical care and a reasonable level of wage replacement for job-related injuries or diseases, even when they are at fault, workers give up the right to sue their employers for unlimited damages. This is known as the exclusive remedy doctrine.

Employers give up the opportunity to reduce or avoid liability by proving that the employee was at fault, but gain protection against unlimited liability. Both workers and employers escape the cost, uncertainty and delay of litigation and the public benefits from a reduced caseload in the welfare and the judicial systems.

We would like to reemphasize that a lot of the problems associated with the current asbestos situation is not a workers' compensation problem. In recent years, workers' compensation costs have become a major expense for many employers and according to the Social Security Administration, in 1982, the total cost to employers was just over $22.5 billion, an increase of over 450 percent since 1970. The average cost per employee per year, according to the chamber's employee benefits 1983 survey, was $258. Although the average by industry is as high as $729 for primary metal industries.

The cost varies by occupation and jurisdiction. For example, in 1984, under the Longshore Act, insurance in New York City port area costs as much as $21,000 per year for a longshoreman earning $24,000. Experience rating is a way that workers' compensation is adjusted according to the experience of each employer. This latter watchdog effect is essential to police the program against fraud and abuse and no government agency has the motivation or information to be as effective as the employer in this respect.

Appended to this statement is the chart on occupational disease from our own analysis of workers' compensation laws 1985. As the chart reflects, all occupational diseases are covered on a compulsory basis under all workers' compensation laws, including FECA and the Longshore Act. Benefits for diseases are the same as for traumatic injuries and medical care is unlimited.

Contrary to statements published in the new medias, statistics compiled by the National Council on Compensation Insurance and other data confirm that claimants do, in fact, apply and receive benefits for disability or death caused by occupational disease. However, such claims are a tiny fraction of workers' compensation claims, around 1 percent, representing 2 percent of total benefit costs.

Public awareness of the need for improving workers' compensation may have been at its greatest following a 1972 report of the

National Commission on State Workmens' Compensation Laws, but successful reform efforts have been continuous.

We have long urged our membership to work for and support needed improvement in State and Federal job injury laws. In addition, we have been active at the Federal level in seeking reform of the present Federal programs.

These efforts by all interested parties have led to major improvements in benefits and coverage which we have tracked in the analysis. In 1972, for example, only nine States had a maximum weekly benefit over $80. Today, the average maximum is approximately $322, as shown in Appendix 2.

There are additional reforms that have been made in the coverage of occupational diseases and this has, in our view, been remarkable progress since we first began tracking these State provisions. For example, in 1944, only 28 States were included in our occupational disease chart and only eight of those States had compulsory coverage of all diseases. By 1970, all States covered diseases, but 15 still covered only those diseases listed by statute in a schedule. Today, however, all States have either schedules of covered diseases or amended their laws to include all occupational illnesses not listed.

Examples of several 1984 State law changes are included in the statement. Efforts to speed up the reform process are continuous and the ad hoc Business Council, as well as a report just released by the National Association of Insurance Commissioners, which is being taken up by the NAIC this week, makes some recommendations which we also list in our statement.

Finally, we just wanted to make a comment on some of the other systemic problems that have to be examined and we feel that this subcommittee would be a good arena to do that. In the case of product liability reform legislation, which is pending on the Senate side, S. 100, as well as hearings this month on alternative no-fault remedies being considered by the Senate, and also the Federal compensation track record to date, in particular with the Black Lung Program, we note that as parties involved in the current occupational disease debate and responsible for the development of sound public policy, we must ask ourselves, given the record in the Black Lung Program, if we have really learned a lesson from programs originating as a quick fix or Federal panacea.

I would like to turn it over to Dr. Alter for a few remarks.

STATEMENT OF HARVEY ALTER

Mr. **Alter**. Thank you, Mr. Chairman.

Needless to say, our organization and its members share the compassion and caring for those who may be hurt through no fault of their own, whether it be in the workplace or elsewhere, whether it be from exposure to hazardous substances or hazardous products.

This is a broad field that we have termed injury compensation and in order to study it further, we convened the ad hoc council that Mr. Roth referred to.

We assembled approximately 45 people representing all of the disciplines that we thought were necessary, not only insurance and law, but also environmental science, epidemiology, toxicology and so forth. The council elected to study just three aspects of this vast subject. One, and the major aspect, was to learn the extent of coverage for compensating those injured through no fault of their own. This is public and private insurance, tort law, many related programs, especially in the Federal Government.

The intent originally was to try to identify or count, if you will, those who might fall through this type of safety net. We weren't able to do that; we couldn't quantify it. We started to count the vast numbers who do not fall through, but the statistics count many people twice or more.

We found, though, that there is a vast array of programs and although this may not be a system of compensation, although it may have developed over the decades in a rather ad hoc way, our examination and discussion finds that most of these programs to well serve their intended purposes. This is not to overlook some serious deficiencies. Mr. Roth referred a bit to both tort liability and workers' compensation where reforms, changes are still desperately needed in some narrow areas, and our report has identified some of these, hoping to spur not only the Congress, but also the States to action.

Another part of our report deals with causation, not of asbestosis, that one is easy with what is known today medically, but rather, causation in general. What is the nexus between science and law in this way? How does one prove by the preponderance of the evidence required by the judicial system without so putting barriers in the way of plaintiffs?

The conclusion of our group is not just like so many others; not just another voice for good science, but they outlined at least one manner in which good science could be applied, because good science is to the benefit of both plaintiff and defendant, no matter what the claim.

The third major part of our report is a discussion by a number of people skilled in such matters of the various legislative proposals, for injury compensation that were put forth in the 98th Congress. This was topical when we started it; it was current, and, as I am sure you are aware, very many proposals of all sorts were put forth in the last Congress.

This is a discussion with many hands, as is perhaps typical with this field or is typical of Washington. On the one hand, but on the other; and on the third hand and on the fourth hand.

We found that where many of the proposals had elements of merit, there are still deficiencies in many of the proposals. Now, the group that did this was first challenged to do something a little different. We asked them to presume that a new compensation system was needed in this field and with that presumption, to try to describe one. I have likened this exercise to asking somebody to presume there is a fourth dimension and then describe it. We cannot describe that which is beyond our reach.

This is what happened with the group. As they started, we came across mixtures, hybrids, of all the proposals that people knew of, but not a new system. The fact that this expert group could not do, or that the total council could not do it, I think is an indication of—I don't want to call it impossibility, but let's say the sheer difficulty of trying to do something like this.

Of course, our council was influenced by the discussions of the first group as to the broad extent of coverage of existing programs. Some of the important conclusions, though, of this group was one that fault and no-fault systems should not be hybridized; they should not be mixed. Each has its place, but not in some of the hybrid forms that have been proposed.

Second, the need for some change in tort and in workers' compensation. They are all encouraged, as Mr. Roth pointed out, by the progress that the States have made in the workers' compensation field and we know that we have room to go, room to improve. Indeed the chamber has undertaken for many years trying to get the States to change, and I think with some success.

We also pointed out in the report the differences between the State-run systems and the Federal-run systems. Again, an important conclusion dealt with causation and how good science should or could be applied to this case.

The reports are literally fresh off the press. I have brought two to this subcommittee and would like to leave them with you. Needless to say, I am not going to attempt to summarize 252 pages or we would be here all week.

Now, as a result of not only this report and what Mr. Roth said and some other considerations, we have in our written statement certain conclusions that will be in the record for us to share with you. The most important one is simply that workers who are disabled by occupational disease, the same as anybody hurt by any other caused beyond their control, should receive compensation. They do now have access to this wide spectrum of remedies. I think it behooves all of us to identify where these remedies are not working and to correct them, but not to just throw them out and start over.

Thank you very much.

[The prepared statement of Harvey Roth and Samuel Alter follows:]

LET'S REBUILD, AMERICA

IN THE 80's

Statement of the Chamber of Commerce of the United States

ON: COMPENSATION FOR OCCUPATIONAL DISEASE

TO: SUBCOMMITTEE ON LABOR STANDARDS OF THE HOUSE EDUCATION AND LABOR COMMITTEE

BY: HARVEY ALTER AND SAMUEL A. ROTH

DATE: JUNE 11, 1985

The Chamber's mission is to advance human progress through an economic,
political and social system based on individual freedom,
incentive, initiative, opportunity and responsibility.

The Chamber of Commerce of the United States is the world's largest federation of companies and associations and is the principal spokesman for the American business community. It represents more than 180,000 companies plus several thousand other organizations such as local/state chambers of commerce and trade/professional associations.

More than 90 percent of the Chamber's members are small business firms with fewer than 100 employees, 53 percent with fewer than 10 employees. Yet, virtually all of the nation's largest companies are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

Besides representing a cross section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business--manufacturing, retailing, services, construction, wholesaling, and finance--numbers more than 14,000 members. Yet no one group constitutes as much as 29 percent of the total membership. Further, the Chamber has substantial membership in all 50 states.

The Chamber's international reach is substantial as well. It believes that global interdependence provides an opportunity, not a threat. In addition to the 53 American Chambers of Commerce Abroad, an increasing number of members are engaged in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on national issues are developed by a cross section of its members serving on committees, subcommittees and task forces. Currently, some 1,800 business people participate in this process.

STATEMENT
on
COMPENSATION FOR OCCUPATIONAL DISEASE
before the
SUBCOMMITTEE ON LABOR STANDARDS
of the
HOUSE EDUCATION AND LABOR COMMITTEE
for the
CHAMBER OF COMMERCE OF THE UNITED STATES
by
Harvey Alter and Samuel A. Roth
June 11, 1985

I am Harvey Alter, Manager of the Resources Policy Department of the U.S. Chamber of Commerce and staff coordinator for the Chamber's ad hoc National Business Council on Injury Compensation. I am a chemist by training.

Accompanying me is my colleague, Samuel A. Roth, Associate Manager, Employer Relations for the Chamber and staff executive of our Council on Workers' Compensation. Mr. Roth also edits the Chamber's annual publication Analysis of Workers' Compensation Laws, copies of which will soon be furnished to the members of the committee. We welcome the opportunity to appear on behalf of the Chamber, to express our views on compensation for occupational disease.

The Chamber has long supported provision of adequate and equitable compensation for occupationally caused disability through a sound state workers' compensation system. We also support an equitable product liability tort system for the protection of the public.

Summary of Chamber Position

Occupational disease is a serious societal problem, although there is considerable disagreement over the dimensions. Workers have become ill and, in some cases, died as a result of exposure on the job. Our members, all of whom are employers, are concerned with the health and safety of their workforce and the need for a fair, cost-effective workers' compensation system for disability arising out of and in the course of employment.

For some of our members who are manufacturers or producers product liability tort litigation resulting from workplace asbestos exposure has the catastrophic potential of bankruptcy. Others who are insurers face payments on policies based on premiums that did not anticipate present losses. Moreover, employers, manufacturers, and insurers are concerned that workplace exposure to other substances could lead to health effects not recognized at present.

Of course, occupational disease can be costly for workers and businesses alike. A fair system of compensation is needed. At present, workers' compensation and product liability are the two principal systems that protect workers who develop occupational disease. However, their adequacy, equity, and efficiency have been sharply questioned.

Admittedly, both systems have flaws, but we have not reached the judgment that they are fundamentally unsound, and we are committed to making improvements in them. Moreover, we do not believe that any deficiencies in workers' compensation are responsible for the product liability problems, and we question the need for changing the nature of the state compensation programs in response to such problems. Furthermore, we strongly oppose federal programs designed to replace, supplant, or supplement state workers' compensation.

In recognition of the asbestos problem, as well as other product and environmental exposure problems, the Chamber has recently taken a significant step to seek and recommend new policies and methods for dealing with exposure of workers and others to toxic or potentially toxic substances and any related disease or disability resulting therefrom. Modern times require modern approaches and that is what we believe we have accomplished through our ad hoc National Business Council on Injury Compensation. A description of the ad hoc Council and its just-released report is contained in a later section of this statement.

The Present Myth of Personal Harm

The Chamber shares the concern of this subcommittee and the public for any person who may suffer illness or disability as a result of exposure to toxic substances. Certainly, there is a public perception of a growing incidence of long-latency diseases from exposure to hazardous substances, brought about, in large part, by news media attention. This perception is contradicted by epidemiological data showing that the overall incidence of occupational diseases and of all cancers (except respiratory cancer) has held steady or declined since 1933. We know that great strides have been made in the safe handling and management of substances that would otherwise pose a threat to health and safety, and thus tragedies are being averted. Such accomplishments must be continued and expanded.

Moreover, the public's belief that causal relationships are well established between exposure to hazardous substances and long-latency diseases is not based in fact. Science and medicine have been unable to make clear linkages between substances and/or exposure and specific diseases, for good reasons, and they are not likely to in the near future.

Fortunately, several comprehensive studies are now under way to examine the scope of the problem. The Chamber has contributed to one study conducted by Universities Associated for Research and Education in Pathology.[1/] The results of their work will be supplemented by an investigation now being conducted for the Environmental Protection Agency by the Center for Disease Control.

It has been suggested that the sizeable number of product liability tort suits arising out of workplace exposure to asbestos confirms that there is an epidemic of occupational disease. However, medical science has found

---

[1/] Health Aspects of the Disposal of Waste Chemicals. Universities Associated for Research and Education in Pathology, Inc. Bethesda, Maryland. 1985.

that even among this population there are relatively few proven cases of impaired lung function or other illness caused by asbestos. In fact, many individuals who are diagnosed as having "asbestosis" actually have an asymptomatic condition which shows up on X-rays but is benign. It is the fear of asbestosis and asbestos-related cancer that is widespread.

Coupled with this fear are misunderstandings and erroneous "conventional wisdom." In testimony before the Senate Labor Subcommittee,[2/] both Dr. Paul Wheeler, of the Department of Radiology and Radiological Science of the Johns Hopkins Medical Institutions, and Dr. Robert N. Jones, of Tulane University School of Medicine, who testified on behalf of the American Lung Association and American Thoracic Society, questioned the general accuracy of the diagnoses of asbestos-related diseases. They believe that principles of medical diagnosis have been abrogated in the asbestos field and that various draft bills have not dealt adequately with medical criteria for the conditions to be compensated. Dr. Jones stated, "public policy in this area should be based on scientific information."

Although asbestos is one of 19 chemical substances or industrial processes proven carcenogenic[3/], there are still medical questions raised when consulting the primary cancer literature. Papers from the Sloan-Kettering Cancer Center introduce significant uncertainties about asbestos-related mesothelioma. Malignant mesothelioma is a rare disease with an incidence of 2.2 cases per million population per year.[4,5/]

[2/] P.S. Wheeler, "Asbestos-Related Litigation: A Scientific Perspective and Solution," and R.N. Jones, "Public Responsibility in Asbestos-Related Diseases," before the Subcommittee on Labor, Senate Labor and Human Resources Committee, April 24, 1984.

[3/] "Carcenogenic Risks. Strategies of Intervention." Report 25, World Health Organization, International Agency for Research on Cancer. Geneva. 1978.

[4/] J. Brenner, P.P. Sordillo, G.B. Magill and R.B. Golbey. Malignant Peritoneal Mesothelioma - Review of 25 Patients. Am. J. Gastroenterol., 1981, 75: 311-13.

In a review of 123 patients diagnosed with malignant pleural mesothelioma, the largest series of patients from a single institution so far accumulated, the Sloan-Kettering researchers found that only 16 patients related a history of exposure to asbestos. Fourteen of the patients had a history of previous lung disease; one had received prior radiation to the chest; and 14 had been exposed to industrial dusts and chemicals.[5/] This finding, that not all pleural mesotheliomas are related to asbestos, is consistent with a review of the literature stating that only from 10 to 70 percent of patients with malignant mesothelioma had been exposed to asbestos.[6/]

The general conclusion appears to be that exposure to asbestos is an important etiologic factor but that other factors include serious lung disease, tuberculosis, chemical pneumonia, radiation or industrial dusts and chemicals other than asbestos.

The Sloan-Kettering team, in a review of malignant peritoneal mesothelioma, found no evidence of asbestos linkage.[4/] They also reported that 20 percent of malignant mesotheliomas originate in the peritoneum.

The saddest aspect of this disease is that malignant mesothelioma is found in children. In a review of seven cases, the origin was at the pleura in six and one at the periotoneum. None of the patients related a history of exposure to asbestos.[7/]

[5/] Malignant Mesothelioma of the Pleura, Review of 123 Patients. Cancer, 1982, 49:2431-5.

[6/] K.H. Antman. Malignant Mesothelioma. N. Engl. J. Med., 1980, 303:200-2.

[7/] J. Brenner, P.P. Sordillo and G. B. Magill. Malignant Mesothelioma in Children: Report of Seven Cases and Review of the Literature. Medical and Pediatric Oncology, 1981, 9:367-73.

This is not intended to be a comprehensive review of the literature, but instead to raise questions about the conventional wisdom surrounding asbestos-related diseases. In the absence of definitive information about rare diseases, we should proceed carefully in the formulation of public policy. As noted in the citations, such public policy should be based on good science.

Workers' Compensation For Job-Related Disability

As the record clearly demonstrates, workers' compensation -- a nearly 100-year-old concept -- has proved to be a reasonably efficient method of protecting employers and their employees against the financial risks of job-caused disabilities, while motivating job-place safety and promoting the rehabilitation of injured workers.

It is premised on a quid pro quo. In exchange for certainty and promptness in receiving full medical care and a reasonable level of wage replacement for job-related injuries or diseases, even when they are at fault, workers give up the right to sue their employers for unlimited damages (the "exclusive remedy" doctrine). Employers give up the opportunity to reduce or avoid liability by proving that the employee was at fault but gain protection against unlimited liability. Both workers and employers escape the cost, uncertainty, and delay of litigation, and the public benefits from a reduced case load in the welfare and judicial systems.

The workers' compensation system essentially consists of 56 separate programs. There is one for each state, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and American Samoa. There also are two federal programs, the Longshoremen's and Harbor Workers' Compensation Act (Longshore Act) for maritime workers nationwide and the Federal Employees' Compensation Act (FECA) for federal government workers. The Longshore and FECA programs figure prominently in the discussion of compensation for diseases related to asbestos exposure, because much of it occurred in naval shipyards in World War II. There also is a federal Black Lung program for coal miners and their families, which is intended to compensate for pneumoconiosis caused by exposure to coal dust.

When workers' compensation was carved out of the tort system, it was intended to be neither a new form of damages nor a retirement program. Instead, its focus is on encouraging return to gainful employment. Consequently, eligibility for compensation depends on more than injury in the course of employment. The injury must also cause disability, i.e., loss of wages. To preserve the work incentive, cash benefits typically replace two-thirds of the worker's pay (in addition to full medical expenses). No compensation is payable for pain and suffering, loss of consortium, or other intangible losses, nor are there punitive damages.

In recent years, workers' compensation costs have become a major business expense for many employers. According to the Social Security Administration, the total cost to employers in 1982 (the most recent year for which statistics are available) was just over $22.5 billion -- an increase of more than 450% since 1970. The average cost per employee per year, according to the U.S. Chamber's Employee Benefits 1983 survey, was $258, although the average by industry is as high as $729 (for primary metal industries). The cost varies by occupations and jurisdiction (in 1984, Longshore Act insurance in the New York City port area costs as much as $21,000 per year for a longshoreman earning $24,000). In addition, the cost of workers' compensation insurance is adjusted according to the experience of each employer. Experience rating gives employers incentive not only to hold down costs through preventive measures but also to contest invalid claims. This latter "watchdog" effect is essential to police the program against fraud and abuse. No government agency has the motivation or information to be as effective as the employer in this respect.

Occupational Diseases Are Covered by Workers' Compensation

Appended to this statement is the chart on occupational disease from our Analysis of Workers' Compensation Laws 1985 (Appendix I). As this chart reflects, all occupational diseases are covered on a compulsory basis under all workers' compensation laws, including FECA and the Longshore Act. Benefits for diseases are the same as for traumatic injuries, and medical care is unlimited. Contrary to statements published in the news media, statistics compiled by the National Council on Compensation Insurance and other data confirm that claimants in fact do apply for and receive benefits for disability or death caused by occupational disease. However, such claims are a tiny fraction of workers' compensation claims - around 1 percent, representing 2 percent of total benefit costs.

Workers' compensation laws have been criticized as having arbitrary "barriers" that unfairly exclude legitimate claims. It is true that all workers' compensation laws contain statutes of limitations governing timeliness of claims filing. However, recognizing that some diseases have long latency periods, today most states allow claimants to file within a reasonable time after the disability occurs and the claimant knows or should know that it is traceable to employment. A minority of states has a limitation running from the date of last employment or last exposure. Some states, but not the Longshore or FECA programs, do require that disability occur within a year or two after last exposure, and a small minority of states has minimum length-and/or-location-of-exposure requirements. Such provisions would not disqualify a claimant who has worked continuously for one employer but may disqualify an individual who has changed jobs frequently (for whom accurate information on employment or exposure may be unavailable).

Workers' compensation laws provide benefits at the same level whether disability is caused by disease or traumatic injury. However, because of the long latency and/or complex etiology of many diseases, actual awards may differ. For example, in a minority[8] of jurisdictions, benefits are computed according to wages paid at the time of last exposure and thus may not be representative of actual earnings loss in cases where the disease does not manifest itself until years later. Furthermore, if there is uncertainty over causation, liability, the degree of impairment, or similar issues, the parties may settle the claim voluntarily at a mutually agreed figure that reflects these uncertainties.

---

[8] It is impossible at present to classify every state, because some have never had to address the issue, and others have conflicting precedents.

State Reforms of Workers' Compensation Laws

Workers' compensation certainly has its imperfections. Although it is risky to generalize because each of the 56 programs is unique, many of them have problems that include insufficient emphasis on rehabilitation and early return to work, an alarming line of judicial decisions creating exceptions to the exclusive remedy doctrine, increasing resort to litigation in a system designed to avoid the need for legal representation, and a disproportionate share of benefits paid to individuals with relatively minor injuries. Of course, for employers the overwhelming problem is the rapidly escalating burden of payroll costs, especially acute for small business. Proposals for changes in a state's coverage of occupational diseases must be considered in the context of other problems that may affect a far greater universe of claims.

Public awareness of the need for improving workers' compensation may have been greatest following the 1972 report of the National Commission on State Workmen's Compensation Laws, but successful reform efforts have been continuous. The U.S. Chamber has long urged our membership to work for and support needed improvements in state and federal job injury laws. In addition, we have been active at the federal level in seeking reform of the present federal programs.

These efforts by all interested parties have led to major improvements in benefits and coverage, which we have tracked in the Analysis. In 1972, for example, only nine states had a maximum weekly benefit over $80.00. Today, however, the average maximum is approximately $322.00 (see Appendix II).

The reforms have also included substantial improvement in coverage of occupational diseases. There has been remarkable progress since the Chamber first began tracking disease provisions. For example, in 1944 only 28 states were included in the occupational disease chart, and only eight of those states had compulsory coverage of all diseases. By 1970, all states covered diseases, but 15 still covered only those diseases listed by statute in a schedule. Today, however, all states have either abolished schedules of covered diseases or amended their laws to include all occupational illnesses not listed. Only a few states now deny compensation for partial disability in case of certain diseases, and all arbitrary limits on medical care for diseases have been repealed. Provisions for lower benefits in case of disability caused by disease have been abolished in all states.

Statutes of limitations have been extended for diseases with long latency periods. The majority of states now allows claims within a reasonable time after discovery of the disability and its relationship to employment. Even states with limitations running from last exposure or last employment have made exceptions for illnesses known to have long latency periods, such as diseases caused by radiation. A trend is under way in these states to apply similar rules to other long latency diseases. For example, last year alone, Alabama amended its law to allow claims for disability or death relating to occupational disease to be filed within two years (instead of one year); Illinois provided that a claim for asbestosis be filed within 25 years of last exposure; and New York expanded its time limit on claim filing to allow claims within two years claimant knows/should know relation to employment, while Washington and North Carolina will now also allow claims filed within two years of notification by competent medical authority. Other states have made similar changes in the past few years.

Efforts to speed up the reform process now are under way. A report on occupational disease prepared by Crum and Forster Insurance Companies, Inc., documenting the nature of the problem and recommending specific changes in state law, has been well received and widely publicized. A business and insurance task force on occupational disease under the aegis of the National Association of Insurance Commissioners (NAIC) and the International Association of Industrial Accident Boards and Commissions has recently completed its own recommendations.

The NAIC Occupational Disease Advisory Committee's report[9] and accompanying recommendations were scheduled to be taken up by the full NAIC on June 9, and we expect the report will be made available to policymakers and interested parties at the federal and state level. The NAIC Advisory Committee conclusions are significant for many reasons, including the following

o reaffirms its support for, and faith in state workers' compensation systems for injuries of all types, including occupational disease;

o recognizes that the current problems involving asbestos litigation arise because of problems in tort law rather than workers' compensation and suggests that workers' compensation systems not be distorted in hopes of solving the problems of tort law, but also recognizes that the overlap between the two systems is relevant to overall debate on occupational disease and that further research is needed to properly differentiate between the two;

o endorses the continuing efforts to effect changes in state workers' compensation laws which remove barriers to prompt and equitable compensation to those individuals deserving of compensation;

o notes that, given current information, most state workers' compensation statutes do not contain barriers to compensation for occupational disease, and that a continuation of the current claims trend into the future will not adversely affect any remaining states removing such barriers (the NAIC report does express caution, however, in that with the exact amount or volume of future claims being unknown, significant increases in such claims may adversely impact state workers' compensation system); and,

o notes that, just as laws must be changed to assure compensation for deserving claimants, laws must also be strengthened to protect employers from liability where the illness is caused by the aging process or non-work factors or there is a low probability that the disease arose out of and in the course of employment.

---

[9] The Subcommittee should know that organized labor, while an official member of the NAIC Advisory Committee, failed to remain an active participant after the first few initial meetings. In a separate development, the AFL-CIO has formed a new legal rights foundation whose stated purpose is to try selected cases involving the cornerstone of workers' compensation systems -- the exclusivity doctrine. This reflects their belief that the doctrine hold only in cases where the employee is at fault. We feel this is an unfortunate decision by the leadership within organized labor and we continue to monitor the situation, since continued employer support for workers' compensation is predicated upon preservation of the exclusivity doctrine.

The U.S. Chamber is committed to the success of these efforts. In addition to the review of the injury compensation issue by the ad hoc council, our Council on Workers' Compensation, a standing policy committee, is working actively to assure that state workers' compensation laws are up to date with respect to compensating disability attributable to occupational disease. In late 1983, at the Council's request, our Board of Directors issued a call to action to our members, urging them to make sure that their state laws are fair and in accord with modern science (See Appendix III). The Council and our staff continue to work with state business leaders to facilitate this process.

The Chamber recognizes that our contribution is only a small part of the equation and that there are many more related activities in progress, in both the public and private sectors. In particular, we commend this Subcommittee for these hearings, which we believe will prove instrumental in spurring the states to action.

We must caution, however, against undue expectations of overnight success. While we acknowledge the urgency of remedial action, a realistic understanding of the legislative and political process suggests that it can be time consuming. Many competing interests must be balanced, and ways found to implement improvements in benefits without driving employers out of business.

Federal Compensation Track Record

Inextricably bound up in the policy debate over occupational disease is the historic question of whether the state workers' compensation programs should be federalized, as advocated by organized labor.

As we have testified on numerous occasions before Congress, we strongly oppose federal programs designed to replace, supplant, or supplement state workers' compensation. We believe that, with all their imperfections, workers' compensation programs are best designed and implemented by state governments, which are more cognizant of local needs and circumstances.

Experience with the three federal compensation programs confirms the wisdom of the state approach. The Longshore Act, FECA, and the Black Lung program are all notoriously costly, slow in delivering benefits, and inefficient in weeding out questionable claims. None of this is news to this Subcommittee, which has oversight of all three.

The Black Lung Act is especially relevant to the occupational disease debate because it demonstrates the propensity of the federal government in responding to this type of problem. The General Accounting Office has reported that, in nearly nine out of ten cases claims are approved without medical evidence of disability caused by exposure to coal dust, and that this unenviable record results from presumptions contained in the statute itself. Consequently, the Black Lung program has grown from a temporary program estimated to cost less than $90 million in toto, into a permanent program costing more than $2 billion annually and contributing to the federal budget deficit.

A Black Lung Disability Trust Fund, financed by an excise tax on coal production, was set up by 1978 amendments to pay claims where the last employment was prior to 1970 or where no responsible coal mine operator has been identified. The fund was in deficit by $2.5 billion as of December 31, 1984, despite 1981 amendments that doubled the coal tax and revised eligibility criteria in an effort to make the fund solvent. Although the claims approval rate has dropped, the Reagan Administration has concluded in its federal budget proposal for FY '86 that an additional coal tax is necessary.

As parties involved in the current occupational disease debate and responsible for the development of public policy, we must ask ourselves if we have really learned a lesson from programs originating as a quick-fix, federal panacea.

An Alternative: The Asbestos Claims Facility

We believe that all parties involved in the ongoing occupational disease debate have a sincere desire to provide prompt compensation to disabled workers. On March 19, 1985, the Senate Labor Subcommittee held a hearing on an unprecedented example of private sector initiatives designed to extricate deserving claimants with asbestos-related diseases from the existing legal quagmire -- the formation of the Asbestos Claims Facility.

The "Wellington Facility" (named after Yale University Law School Dean Harry Wellington, who has been serving as the neutral moderator) represents a promising alternative. Many companies who are either manufacturers of asbestos or their insurers have voluntarily conditionally subscribed to the agreement, with the conversion to a final agreement expected within weeks.

In his March 19 testimony, Dean Wellington briefly described the Facility:

> It is important that the Asbestos Claims Facility is all voluntary. A plaintiff desiring to litigate through the courts will still be free to go that route, originally or at any time the plaintiff should be dissatisfied with the Facility.
>
> The signatories to the Agreement -- the Facility's members -- however, will refer all claims against them to the Facility for handling. And they will give the Facility authority to evaluate, settle, pay or defend all asbestos-related claims against them. This will greatly simplify procedures and reduce the time required to reach actual pay-out.
>
> Claimants will be required to submit certain standard information, including employment, medical and compensation history. The claimant will have to have been exposed to asbestos-containing products manufactured by one of the Facility's members and have a diagnosed asbestos-related disease.
>
> If a negotiated settlement cannot be reached, the Facility will offer a full range of mediation services. And, if a case cannot be settled by the "Alternate Dispute Resolution" procedure, the Facility will provide for the joint defense of all members, using a single defense team.

> The Facility, by the way, will be funded by its members and will be a not-for-profit corporation.

We call to this subcommittee's attention this voluntary and meritorious effort by manufacturers, insurers, labor and the trial bar to propose a solution which may indeed prove to mitigate the need for establishing a new federal entitlement program.

As John L. Baldwin, President and Chief Executive Officer for the Pittsburgh-Corning Corporation also noted at the March 19 hearing:

> It is an agreement that provides a much higher level of certainty for both producers and insurers, allowing us to devote our own energies where they really should be -- seeing to it that the truly injured workers are compensated in a timely and equitable fashion.

Product Liability Law and Occupational Disease

Workers' compensation is an individual's first avenue of protection in case of occupational injury and ordinarily constitutes the exclusive remedy against the employer. However, tort liability for injuries caused by parties outside the workplace continues independent of and simultaneous with any right to workers' compensation.

Critics of workers' compensation charge that its inadequacies are responsible for the asbestos tort litigation. We believe otherwise -- the occupational tort litigation can be better accounted for by the differences in function and purpose between the no-fault workers' compensation system and the fault-based tort system. The fact that a substantial percentage of the asbestos tort plaintiffs are covered by the Longshore Act or FECA, the most generous workers' compensation systems in the country, confirms this belief.

No matter how generous a workers' compensation program may be, a worker has little to lose and much to gain by seeking a tort recovery. Tort cases, unlike workers' compensation, usually are handled on a contingency fee basis, and offer the opportunity to recover unlimited damages for economic and intangible losses, plus the possibility of punitive damages. Furthermore, unlike workers' compensation, a tort recovery may be possible for a physical impairment that causes no interruption of income (as is the case with respect to much of the asbestos litigation).

In fact, for tactical and other reasons, some individuals decline to file for workers' compensation, which requires an impartial medical examination, regulates attorney fees, and must be coordinated with Social Security Disability Insurance. In addition, because any workers' compensation received usually is deductible from the tort judgment or settlement, plaintiff's counsel may be reluctant to try a case twice for one recovery. In many instances, the plaintiffs' bar is unfamiliar with workers' compensation, and a separate claimants' bar handles such cases.

The tiny number of claims filed with California's special workers' compensation asbestos fund, which is specifically designed to remove barriers to compensation for workers suffering from asbestos-related diseases, provides additional evidence that only a small percentage of asbestos plaintiffs are actually disabled by, rather than simply exposed to, asbestos.

Moreover, employers themselves may initiate tort claims against manufacturers. Except in Georgia, workers' compensation laws allow the employer to recover compensation benefits from any third party tort settlement or judgment.[10/] Indeed, the right to sue the manufacturer typically passes to the employer after a prescribed time if not exercised by the employee. This right is referred to as the "employer's lien" or "right of subrogation."

Existing product liability tort law is in serious need of reform. Rules determining the liability of product sellers for product-related injuries vary widely and often are in direct conflict from one state to another. Moreover, because these rules are judicially created, they may change as the judicial temperament changes. The result is a wide variation of law which is changing constantly and is totally unpredictable.

10/ In Ohio, the employer may recover the increase in workers' compensation premium caused by injury for which a third party is liable.

This wide variation limits the ability of manufacturers to make informed decisions regarding the design of products for nationwide distribution and sale. For this reason the U.S. Chamber has taken a strong position in favor of S. 100, the proposed federal Product Liability Act, which would bring certainty to the law and ease what has become a serious burden on interstate commerce.

S. 100, however, is not designed as a remedy for the "toxic torts" problem, although several of its provisions would come into play in occupational disease tort cases. For example, the statute of limitations in product liability tort cases would run from discovery, rather than last exposure as required in some states at present.

S. 100 seeks to strengthen the tort system by reinforcing its fault-based foundation and by sharpening distinctions between workers' compensation and tort. One way in which S. 100 would accomplish this is by prohibiting worker suits against their employers under the discredited "dual capacity" theory or through the artifice of an action against a third party who may, in a few states, be allowed to implead the employer. These provisions should be extended to cover so-called "intentional tort" and co-employee suits.

Several related provisions in S. 100, however, have proven controversial among our members. The bill would remove the employer's right of subrogation in workers' compensation cases where third party liability may exist, and require the trial court in a product case to deduct the amount of workers' compensation which would be payable if the tort plaintiff had filed a workers' compensation claim. These provisions have a direct bearing on tort liability for asbestos-related disease, and could result in shifting liability from manufacturers to employers. More information on the effect of these provisions would be beneficial and this subcommittee could provide invaluable assistance in conducting research on them. Even as we acknowledge the value of additional information on these points, we nevertheless urge the Congress to enact S. 100 without further delay.

Finally, we note that in conjuction with product liability tort reform as embraced in S. 100, the Senate Commerce Committee is exploring whether a no-fault product liability compensation remedy would be desired, as suggested by Senators Dodd (D-CT) and Gorton (R-WA). These proposals are conceptually similar to H.R. 1626 (the Asbestos Workers Recovery Act), in that they offer a no-fault benefit in lieu of tort rights that would supplement workers' compensation or other existing sources of compensation. Of course, the Dodd and Gorton proposals would apply to all injuries caused by products, not just asbestos-related illnesses.

These and similar proposals are intriguing in that proponents claim they provide a mechanism to protect individuals who otherwise may "fall between the cracks." On the other hand, they also give rise to many difficult problems. For example, to the extent that they would deny workers any right to sue third parties, they raise questions about constitutionality and the likelihood of public acceptance. We call the subcommittee's attention to attempts by three states to cut off workers' rights to sue third parties, which have failed to pass judicial or legislative muster. We are now reviewing the Dodd and Gorton proposals in our policy committee governing product liability and may have a more detailed analysis at a later time.

National Business Council on Injury Compensation

The general subject of unintended injury to people as a result of exposure to hazardous substances is of broad interest to the business community. Examination of the scope of the problem, identification of specifics, and means of dealing fairly with those who might be so injured require the expertise of many disciplines. Approximately 20 months ago, the Chamber convened what was called the ad hoc National Business Council on Injury Compensation to develop recommendations as to how the business community could responsibly respond to problems related to exposure to hazards.

The Council of approximately 45 professionals included experts in law, toxicology, epidemiology, insurance, workers' compensation, chemistry, engineering, consumer product safety, worker safety, environmental management, and more. Most members were drawn from the approximate eight policy committees of the Chamber affected by this important issue. Others were added to assure that all necessary disciplines were represented. The Council was chaired by Mr. Van Smith, then Chairman of the Board of the U.S. Chamber, an attorney and small businessman with direct experience in some of the fields of import.

The Council addressed three broad sub-sets of the subject: (1) the extent of public and private coverage for people harmed through no fault of their own--including administrative and legal remedies, such as workers' compensation and tort; (2) the relationship between medical causation and law and how to bring the two closer together; and (3) a review of legislative and related proposals to deal with injury compensation.

The Council identified that in 1982 (some statistics were for 1981) first-party insurance and tort payments totaled $142.5 billion, indicating that at least this level of compensation was provided for varying types of disease and injury. Federal government payments alone for health and disability in 1981 were $109.6 billion for some 38.8 million beneficiaries. Approximately 108 million persons were covered by health insurance, 164 million covered for physician's expenses, 158 million by major medical, and 80 million by disability, among others. On the basis of this and other information, the Council found that the present extent of coverage is broad.

A review of the present tort and workers' compensation systems showed both successes and failures in providing recourse for injured parties. Some needed improvements were identified. Both the administrative and tort systems in place today were judged against their intended goals.

At the outset, an attempt was made to identify those groups in our population who may be falling through the safety net of public and private compensation systems. Research showed that this was not possible. However, those caught by this net could be counted (although not unambiguously), and the number is quite high.

The nexus between science and law, for the determination of causation, was examined. Proper determination of causation is essential in order not to deny those harmed compensation (and treatment) and not to charge falsely those who are not responsible. At the same time, it was recognized that science is rarely able to unequivocally establish causation. Medicine, biology and the related sciences needed to establish causation are complex and incomplete in their understanding of disease etiology and the human body. A patient's medical history and life-style enter into questions of causation as well.

The Council not only called for the wider application of "good science" but also outlined how this might be achieved. Koch's postulates of causation, first published in the last century and updated with the understanding of viral diseases, still hold. The Council outlined how these might be applied in independent determinations of causation and responsibility.

They reasoned that bringing good science into the decisionmaking process will not cure the problem presented by juries who rule for plaintiffs out of sympathy for their injuries or diseases rather than by a weighted conclusion of the defendant's responsibility. This problem should be dealt with by determining causation and responsibility issues first and separately from issues of injury and damages and certainly not in the reverse order. The scientific data needed to establish a standard of scientific proof should consist of adequately controlled studies in animals and/or humans by methods technically and reasonably applicable and acceptable to the professions. Methods for applying this standard and related standards of professionalism to determining causation have been outlined by the Council. An approach to the medical panels that would be established by H.R. 1626 is one such method.

Finally, the Council reviewed and criticized (positively and negatively) several proposals for dealing with injury compensation. Proposals were examined by discussing the spectrum of choices each contains by comparison of trade-offs. There is no inference that any of the trade-offs are necessarily viable or acceptable to any of the participants in the debate, but are presented in the report as a means of illustrating the complexities of the issues.

A principal finding was that the new proposals typically confuse or blur the distinctions between fault and no-fault compensation systems. The debate would be clarified significantly if the participants could be persuaded to recognize that there are choices or trade-offs involved in shifting back and forth between the two.

The ad hoc National Business Council on Injury Compensation made several recommendations, which were adopted as policy by the Chamber's Board of Directors. These are included here as Appendix IV. We urge the Subcommittee's careful review of the Council's report which will be made available to you soon.

CONCLUSION

Workers who are disabled by occupational disease should receive compensation and do have access to the workers' compensation and tort systems. Workers' compensation laws provide benefits for occupational diseases when claimants can prove that their disabilities result from workplace exposure. While imperfect, these programs have undergone and continue to undergo major improvements, including their coverage of occupational diseases. The business community is working to facilitate the process of removing restrictions in a few state laws that may unfairly prevent payment of compensation for a disease that has a long latency period. Furthermore, there are no "barriers to compensation" in the two federal workers' compensation programs that cover many of the asbestos tort plaintiffs.

There are indeed serious problems with compensating illness related to workplace exposure through the tort system; however, these problems are not attributable to workers' compensation, and federalization of workers' compensation will not solve them. The poor record of existing federal programs substantiates our view that workers' compensation should be left to the states.

Reform of the tort system generally is needed to strike a balance among the rights of plaintiffs and defendants, individuals, businesses, and society. The Chamber strongly supports S. 100, the federal Product Liability Act, but recognizes that it is not designed to address the particular problems of compensating individuals whose diseases arise after a long latency period and/or have complex or unknown etiology.

We sincerely hope that the ad hoc Council and NAIC reports (along with their recommendations) will assist the subcommittee in illuminating the many complex and often overlapping medical, scientific and legal issues surrounding the occupational disease debate.

Finally, we respectfully urge this subcommittee — and the Congress — to give due consideration and weight to these issues, whose resolution will allow all concerned parties to reach our common goal of providing prompt and equitable compensation to those truly disabled and deserving workers, just as all who are participating in the Wellington Facility are attempting to do.

We stand ready to assist the subcommittee in the future on these and other issues of concern. Thank you for the opportunity to present our views.

Appendix I

CHART IV COVERAGE OF OCCUPATIONAL DISEASES January 1, 1985

JURISDICTION	NATURE OF COVERAGE[1]	MEDICAL BOARDS	ONSET OF DISABILITY OR DEATH	TIME LIMIT ON CLAIM FILING	DEDUCTIONS FROM DEATH AWARDS	MEDICAL CARE	COMPENSATION[2]
ALABAMA	All diseases		[illegible]	[illegible]		Unlimited	[illegible]
ALASKA	All diseases			[illegible]		Unlimited	Same as for accidents
AMERICAN SAMOA	All diseases	Claimant examined by physician selected by Commissioner		[illegible]		Unlimited	Same as for accidents
ARIZONA	All diseases	[illegible]	[illegible]	[illegible]	Disability payments	Unlimited	Same as for accidents
ARKANSAS	All diseases		[illegible]	[illegible]		Unlimited	[illegible]
CALIFORNIA	[illegible]			[illegible]		Unlimited	Same as for accidents
COLORADO	All diseases		[illegible]	[illegible]		Unlimited	Same as for accidents
CONNECTICUT	All diseases	[illegible]		[illegible]		Unlimited	Same as for accidents
DELAWARE	All diseases			[illegible]		Unlimited	Same as for accidents
DISTRICT OF COLUMBIA	All diseases			[illegible]		Unlimited	Same as for accidents
FLORIDA	All diseases		[illegible]	[illegible]		Unlimited	Same as for accidents
GEORGIA	All diseases	[illegible]	[illegible]	[illegible]	Disability payments	Unlimited	[illegible]
GUAM	All diseases			[illegible]		Unlimited	Same as for accidents
HAWAII	All diseases			[illegible]		Unlimited	Same as for accidents

[1] [illegible]

[2] [illegible]

[illegible]

BEST COPY AVAILABLE

CHART IV ☐ COVERAGE OF OCCUPATIONAL DISEASES ☐ January 1, 1985 (continued)

JURISDICTION	NATURE OF COVERAGE[1]	MEDICAL BOARDS	ONSET OF DISABILITY OR DEATH	TIME LIMIT ON CLAIM FILING	DEDUCTIONS FROM DEATH AWARDS	MEDICAL CARE	COMPENSATION[2]
IDAHO	All diseases		Within 1 year after last exposure (4 years for silicosis, 7 years for death following continuous disability). Employer liable for nonacute disease only if exposure lasts 60 days. Silicosis—exposure must occur in 5 years during 10 years prior to disablement (last 2 in-state unless same employer)	Within 1 year after manifestation or death. Silicosis—within 4 years after last exposure. Radiation or unusual disease—within 1 year after incapacity, disability, or death and claimant knows/should know relation to employment	Disability payments	Unlimited	Same as for accidents. Silicosis—partial disability noncompensable
ILLINOIS	All diseases		Disability—within 2 years after last exposure (3 years for berylliosis or silicosis, 25 years for asbestosis or radiation)	Disability—within 3 years after disablement or 2 years after last payment. Death—within 3 years after death or last payment. Coal miner's pneumoconiosis—within 5 years after last exposure or last payment. Radiation or asbestosis—within 25 years after last exposure	Disability payments but with minimum compensation	Unlimited	Same as for accidents
INDIANA	All diseases		Disablement—within 2 years after last exposure (3 years if caused by asbestos, coal, or silica dust); radiation—within 2 years after claimant knows/should know relation to employment. Death—within 2 years after disablement or during pendency of disability claim filed within that period; within 2 years after fixed disability expires but no later than 300 weeks after disablement. Employer liable for silicosis or asbestosis only if exposure lasts 60 days	Within 2 years after disablement or death	Disability payments	Unlimited	Same as for accidents
IOWA	All diseases	Medical Board may decide controverted medical questions or provide medical examinations for certain employees	Disability or death—within 1 year after last exposure (3 years for pneumoconiosis, 7 years for death following continuous disability). Pneumoconiosis presumed nonoccupational absent exposure in 5 years over 10 years prior to disability (2 of 5 years in-state); employer liable only if exposure lasts 60 days	Within 2 years after death or disablement or 3 years after last payment. Radiation—within 90 days after disablement or death and claimant knows/should know relation to employment	Same as for accidents	Unlimited	Same as for accidents. Pneumoconiosis—partial disability less than 20-1/2% is noncompensable
KANSAS	All diseases		Disability or death—within 1 year after last exposure (3 years for death from silicosis, 7 years for death following continuous disability). Does not apply to radiation. Silicosis presumed nonoccupational absent exposure in 5 years over 10 years prior to disability (2 of 5 years in-state unless same employer); employer liable only if exposure lasts 60 days	Within 1 year after disablement, death, or last payment (2 years after last payment in case of disease). Radiation—within 1 year after claimant knows/should know relation to employment		Unlimited	Same as for accidents
KENTUCKY	All diseases			Disability—within 3 years after last exposure or first manifestation. Death—within 3 years, if it occurs within 3 years after last exposure or first manifestation. Limit waived where voluntary payment or employer knows of disease and cause. No claim more than 5 years after last exposure (20 years in case of radiation), except for death within 20 years after continuous disability begins in cases where there is award or timely claim for disability		Unlimited	Same as for accidents. Where disablement occurs after 5 years' exposure or results from silicosis or pneumoconiosis, apportioned between employer and Special Fund: Fund pays 75% of cost if not conclusively proven to result from last exposure; otherwise pays 40%. Employer pays balance
LOUISIANA	All diseases		Disease contracted in less than 1 year presumed to be nonoccupational. Presumption is rebuttable by "overwhelming preponderance of evidence"	Disability—within 6 months after manifestation, occurrence of disability, or worker knows/should know relation to employment. Death—within 6 months, or within 6 months after worker knows/should know relation to employment	Same as for accidents	Unlimited	Same as for accidents
MAINE	All diseases		Incapacity—within 3 years after last exposure (does not apply to asbestos-related disease). Employer liable only if exposure lasts 60 days except for radiation and asbestos-related disease. Silicosis presumed nonoccupational absent in-state exposure in 2 years during 15 years preceding disability (part of exposure may be out of state if same employer)	Within 2 years after incapacity or 1 year after death or last payment (10 years after last payment for asbestos-related disease). If mistake of fact, within reasonable time but no later than 10 years after last payment. Radiation—limit runs from date of incapacity and claimant knows/should know relation to employment	Disability payments	Unlimited	Same as for accidents
MARYLAND	All diseases			Within 2 years after disablement, death, or actual knowledge of relation to employment, whichever later (3 years for pulmonary dust disease)		Unlimited	Same as for accidents
MASSACHUSETTS	All diseases			Within 1 year after injury or death; waivable	Disability payments	Unlimited	Same as for accidents
MICHIGAN	All diseases			Within 2 years after claimant knows/should know relation to employment		Unlimited	Same as for accidents

Idaho: Silicosis—worker who is affected but not disabled may waive full compensation and, if later disabled, receive benefits up to $6,000.

Iowa: Death from respiratory disease of coal miner employed 15 years presumed due to pneumoconiosis.

Effective 7-1-84, 20% threshold requirement repealed; benefits now payable are prospective only.

Kent.: Worker who is affected but not disabled may waive full compensation and if later disabled receive benefits up to 100 weeks.

La.: Black lung claimant must file under state and federal law.

Me.: Claim for asbestos-related disease contracted between 11/20/67 and 10/1/83 must be filed by 1/1/85.

Md.: Disease or injury compensation under federal law other than Social Security Disability Insurance is not compensable.

Mich.: Silicosis, dust disease, and logging industry fund reimburses compensation over $25,000 or 104 weeks, whichever is greater, for injury after 5/20/85; also reimburses benefits in cases of exposure to [illegible] before 7/1/79 and where disability or death occurs/becomes known after 7/1/79.

CHART IV ☐ COVERAGE OF OCCUPATIONAL DISEASES ☐ January 1, 1985 (continued)

JURISDICTION	NATURE OF COVERAGE[1]	MEDICAL BOARDS	ONSET OF DISABILITY OR DEATH	TIME LIMIT ON CLAIM FILING	DEDUCTIONS FROM DEATH AWARDS	MEDICAL CARE	COMPENSATION[2]
MINNESOTA	All diseases			Within 3 years after employee's knowledge of cause of injury or disability		Unlimited	Same as for accidents. Non-disabled claimants eligible for medical services. Supplementary benefits may be payable after 4 years from last exposure
MISSISSIPPI	All diseases			Within 2 years after injury[7] or death	Same as for accidents	Unlimited	Same as for accidents
MISSOURI	All diseases		Last employer liable for disease, asbestosis and radiation if exposure lasts 90 days.[8]	Within 2 years after injury, death or last payment (3 years if no injury report filed); limitation runs from date injury is reasonably apparent	Disability payments	Unlimited	Same as for accidents
MONTANA	All diseases	Examinations made by 1 or more members of the occupational disease panel	Death—within 3 years after last employment unless continuous total disability (does not apply to radiation). Silicosis—total disability or death must occur within 3 years after last employment (except for death following continuous total disability), and employer is liable only if exposure lasts 90 workshifts.[9]	Within 1 year after disability and claimant knows/should know relation to employment. May be extended 2 more years. No claim more than 3 years after last employment (except for radiation or death after continuous total disability).[10]	Disability payments	Unlimited	Same as for accidents excluding partial disability. Worker who is affected but not disabled may leave job and receive compensation up to $10,000. Pneumoconiosis benefits reduced by amount payable under federal law. Benefits for silicosis are supplemented so that combined compensation is $200 monthly; supplement is general revenue financed
NEBRASKA	All diseases			Within 2 years after knew/should have known of injury and relation to employment		Unlimited	Same as for accidents
NEVADA	All diseases	Medical review board selected by director; findings conclusive	Silicosis or respiratory dust disease is noncompensable absent in-state exposure in 3 years during 10 years preceding disability or death	Within 90 days after knowledge of disability and relation to employment or 1 year after death. Silicosis or respiratory dust disease—within 1 year after temporary or total disability or death		Unlimited	Same as for accidents
NEW HAMPSHIRE	All diseases			Within 2 years after injury or death and claimant knows/should know of injury and relation to employment.[10]	Disability payments	Unlimited	Same as for accidents
NEW JERSEY	All diseases			Within 2 years after claimant knows relation to employment or last payment		Unlimited	Same as for accidents
NEW MEXICO	All diseases		Death—within 1 year after last employment (3 years for death following continuous disability), and death must follow disability within 2 years. Silicosis or asbestosis—disability or death within 2 years after last employment (5 years for death following continuous disability); employer is liable only if exposure lasts 60 days; noncompensable absent in-state exposure in 1250 workshifts during 10 years preceding disability. Radiation—disability or death within 10 years after last employment	Within 1 year after disability or death or 1 year 31 days after last voluntary payment. Radiation—within 1 year after disability begins or death and claimant knows/should know relation to employment	Disability payments	Unlimited	Same as for accidents
NEW YORK	All diseases			Within 2 years after disablement or death, or two years after claimant knew/should know relation to employment		Unlimited	Same as for accidents[11]
NORTH CAROLINA	All diseases	Commission appoints 3-member advisory board for silicosis or asbestosis cases	Death within 2 years after injury, if totally disabled 6 years after injury or 2 years after final determination. Asbestosis—disability or death within 10 years after last exposure; for death following continuous disability, disability must occur within 10 years after last exposure.[12] Lead poisoning—disability or death within 2 years after last exposure; for death following continuous disability, disability must occur within 2 years after last exposure	Within 2 years after disablement, death, or last payment, or within 2 years of notification by competent medical authority, whichever last occurs. Radiation—within 2 years after incapacity and claimant knows/should know relation to employment		Unlimited	Same as for accidents[13]
NORTH DAKOTA	All diseases		Death—within 1 year after injury if no disability, or 1 year after cessation of disability, or 6 years after injury if disability is continuous.[14]	Within 1 year after injury; within 2 years after death (2 years after injury if no claim prior to death).[14]		Unlimited	Same as for accidents
OHIO	All diseases	Medical specialists in [illegible] cases. [illegible]		Within 2 years after disability or death or within 6 months after diagnosis, whichever is later		Unlimited	Same as for accidents. No partial disability for respiratory dust disease.[15]

Mass. [7]For radiation, date of disablement is date of injury.

Mo. [8]By court decision. Does not apply to [illegible] v. Carlson Tent Products Corp., 651 S.W.2d 613 (Ct. App. 1983).

Mont. [9]Silicosis is noncompensable absent in-state exposure in 1,000 workshifts during 5 years preceding total disability. Claimant who is discharged [illegible] may receive compensation when totally disabled if employed 700 workshifts.

N.H. [10]Date of injury is last date of exposure or first date worker knows/should know relation to employment.

N.Y. [11]Liability for death due to silicosis or dust disease reimbursed from special fund for all payments over 104 weeks.

N.C. [12]Asbestosis or silicosis is noncompensable absent in-state exposure in 2 years during 10 years preceding last exposure or if exposure is less than 30 working days in 7 consecutive months.

[13]Worker who is affected but not disabled by asbestosis or silicosis or who is removed from exposure receives benefits up to $80 weekly for 104 weeks. If later totally disabled, full compensation is paid. If death results within 2 years after last exposure (350 weeks if caused by secondary infection), full compensation is paid. If partially disabled, 66-2/3% of wage loss is paid for another 100 weeks. If unrelated death, balance of 104 weeks is paid plus 300 weeks (total disability) or percentage of 100 weeks (partial disability). Worker may waive full compensation and receive 104 weeks of compensation plus 100 more weeks if later disabled or dies.

N.D. [14]Date of injury is date on which a reasonable person knows/should know relation to employment.

Ohio [15]Includes asbestosis, silicosis, and coal worker's pneumoconiosis. Worker who is affected but not disabled by respiratory dust disease and leaves employment may receive $40 weekly for 30 weeks, then 66-2/3% of wage loss (not to exceed [illegible] weekly).

CHART IV ☐ COVERAGE OF OCCUPATIONAL DISEASES ☐ January 1, 1985 (continued)

JURISDICTION	NATURE OF COVERAGE	MEDICAL BOARDS	LIMIT OF DISABILITY OR DEATH	TIME LIMIT ON CLAIM FILING	DEDUCTIONS FROM DEATH AWARDS	MEDICAL CARE	COMPENSATION
OKLAHOMA	All diseases		Employer liable for silicosis or asbestosis only if exposure lasts 60 days	Within 18 months after last exposure or manifestation and diagnosis by a physician, or within 3 months after disablement		Unlimited	Same as for accidents
OREGON	All diseases			Within 5 years after last exposure and within 180 days after disablement or physician informs claimant of disablement; 10 years after last exposure for radiation disease		Unlimited	Same as for accidents
PENNSYLVANIA	All diseases	Examination by impartial physician may be ordered	Within 300 weeks after last exposure (include death following disability that occurs within 300 weeks after last exposure). Silicosis, anthracosilicosis, or coalminer's pneumoconiosis—noncompensable absent in-state exposure in 2 years during 10 years preceding disability	Within 3 years after disablement, death, or last payment. Radiation—within 3 years after the employee knew/should know relation to employment		Unlimited	Same as for accidents
PUERTO RICO	Diseases as provided by law		Disability—within 1 year after last exposure, except diseases with longer latency periods	Within 3 years from time employee learns nature of disability		Unlimited	Same as for accidents
RHODE ISLAND	All diseases	Director of Labor appoints impartial physician		Within 2 years after disability or death. Radiation—within 1 year after claimant knows/should know relation to employment	Disability payments	Unlimited	Same as for accidents
SOUTH CAROLINA	All diseases	Medical board determines controverted medical questions; pulmonary cases may be referred to pulmonary specialist of state medical universities	Disease must be contracted within 1 year after last exposure (2 years for pulmonary dust diseases), except radiation. Silicosis is noncompensable absent exposure for 7 years	Within 2 years after delivered diagnosis or 1 year after death. Radiation—limitation runs from date of disability and claimant knows/should know relation to employment	Disability payments	Unlimited	Same as for accidents. Worker who is affected but not disabled may waive compensation (except radiation)
SOUTH DAKOTA	All diseases	Division may contract with physicians for reports	Silicosis—noncompensable absent in-state exposure in 2 years; in-state requirement waived if same employer; employer liable only if exposure lasts 60 days	Within 2 years after disability or death. Radiation—within 1 year after disability and claimant knows relation to employment	Disability payments	Unlimited	Same as for accidents, for permanent partial disability for silicosis
TENNESSEE	All diseases			Within 1 year after incapacity or death	Same as for accidents	Unlimited	Same as for accidents. Coalminer's pneumoconiosis—same as federal Black Lung Act
TEXAS	All diseases	Provides for medical committee in case of controverted questions and with power to order examinations		Within 1 year after injury or first distinct manifestation, 1 year after death. May be extended	Same as for accidents		Same as for accidents
UTAH	All diseases	Commission appoints medical panel of 1 or more to report on extent of disability	Partial disability—within 2 years after last exposure. Total disability—within 1 year after last employment, for silicosis 3 years (uncomplicated) or 5 years (complicated). Death—within 3 years after last employment (5 years for complicated silicosis or death following continuous total disability). Not applicable to radiation. Silicosis—noncompensable absent 5 years in-state exposure in 15 years preceding disability; employer liable only if exposure lasts 30 days	Within 1 year after incapacity or death and claimant knows/should know relation to employment, but no later than 3 years after death. Permanent partial disability—within 2 years	Disability payments	Unlimited	Same as for accidents
VERMONT	All diseases		Disablement—within 5 years after last exposure. Death—during continuous employment or after continuous disability beginning within 5 years after last exposure, but no later than 12 years after last exposure. Does not apply to radiation	Within 1 year after disability, death, or last payment. Radiation—within 1 year after first incapacity and worker knew/should have known relation to employment		Unlimited	Same as for accidents. Affected but nondisabled worker may waive full compensation and later receive limited compensation
VIRGIN ISLANDS	All diseases			Within 60 days after disability		Same as for accidents	Same as for accidents
VIRGINIA	All diseases		Exposure in 60 work shifts conclusively presumed injurious exposure	Within 2 years after diagnosis is first communicated to worker, or within 5 years after last exposure whichever is first. Within 3 years after death occurring within periods for disability	Disability payments	Unlimited	Same as for accidents. Worker who is affected but not disabled may waive compensation
WASHINGTON	All diseases			Within 2 years after physician's written notice to claimant		Unlimited	Same as for accidents

Okla.: Worker who is affected but not disabled by silicosis or asbestosis may waive compensation for aggravation of disease and, if later disabled, receive benefits for 100 weeks up to $2,500.

Ore.: Asbestos-related disease—within 40 years after last exposure and 180 days after disability or knowledge of disability.

Pa.: Under Occupational Disease Act, state pays [illegible] months for total disability or death caused by silicosis, anthracosilicosis, coalminer's pneumoconiosis, or asbestosis, provided there has been 2 years of in-state exposure in cases where the claim is barred by the statute of limitations and the last exposure occurred before 1965 or where exposure occurred under several employers.

S.D.: Worker who is affected by silicosis but not disabled may waive full compensation and if later disabled or dies receive benefits up to 52 times the maximum weekly benefit. If leaves employment, may receive compensation up to $1,000.

Utah: Worker with permanent partial disability who must change occupation may receive up to $1,000 for vocational rehabilitation and retraining, plus compensation at 66-2/3% of average weekly wages up to 66-2/3% of [illegible] for up to 20 weeks; then additional compensation; cumulative total may not exceed [illegible].

Va.: 3-year limitation does not apply to cataract of the eyes, skin cancer, radium disability, ulceration, undulant fever, angiosarcoma of the liver due to vinyl chloride exposure, or mesothelioma; byssinosis—within 7 years after last exposure; coalminer's pneumoconiosis—within 3 years after diagnosis; asbestosis—within 2 years after diagnosis or, if based on changed condition, within 3 years after diagnosis of advanced stage.

Compensation for advanced asbestosis based on wages at a time of diagnosis if employed in same employment where injurious exposure occurred; otherwise based on average weekly wage of worker in similar employment.

BEST COPY AVAILABLE

CHART IV □ COVERAGE OF OCCUPATIONAL DISEASES □ January 1, 1985 (continued)

JURISDICTION	NATURE OF COVERAGE[1]	MEDICAL BOARDS	ONSET OF DISABILITY OR DEATH	TIME LIMIT ON CLAIM FILING	DEDUCTIONS FROM DEATH AWARDS	MEDICAL CARE	COMPENSATION[2]
WEST VIRGINIA	All diseases	Occupational Pneumoconiosis Board appointed by Commissioner determines medical questions.	Occupational pneumoconiosis is noncompensable absent 2 years continuous in-state exposure in 10 years before last exposure or 5 years cumulative in-state exposure within 15 years before date of last exposure.	Within 3 years after knowledge or last exposure. Within 2 years after death.		Unlimited	Same as for accidents
WISCONSIN	All diseases	May appoint independent medical expert in doubtful cases.		Unlimited. After 12 years claim may be filed with state fund.		Unlimited	Same as for accidents
WYOMING	All diseases	Yes		Within 1 year after diagnosis or 3 years after exposure, whichever is last. Radiation—within 1 year after diagnosis or death.	Disability payments	Unlimited	Same as for accidents
F.E.C.A.	All diseases			Within 3 years after injury, death or disability and claimant knows or should know relation to employment; excusable.		Unlimited	Same as for accidents
LONGSHORE ACT	All diseases			Within 1 year after injury, death, last payment, or knowledge of relation to employment.		Unlimited	Same as for accidents
ALBERTA	All diseases	Independent medical board may be appointed to report on medical questions and extent of disability.		Within 1 year after injury or death; excusable. Silicosis—disablement or death following significant exposure.		Unlimited	Same as for accidents
BRITISH COLUMBIA	All diseases	Medical review panel appointed by Lt.-Gov. in Council. Decision final as to medical evidence.		Within 1 year after disablement or death; excusable within 3 years.		Unlimited	Same as for accidents
MANITOBA	All diseases	Medical or neurology review panel reports on medical questions. Special panel for silicosis.		Within 1 year after injury or death. Silicosis—1 year after last exposure; if continuously exposed, within 2 years after death free of disease.		Unlimited	Same as for accidents
NEW BRUNSWICK	All defined industrial diseases			Within 1 year after injury or 6 months after death.		Unlimited	Same as for accidents
NEWFOUNDLAND	All diseases	Committee of medical referees appointed by Commission.		Within 6 months after injury, disablement, or death.		Unlimited	Same as for accidents
NORTHWEST TERRITORIES	All diseases	Board may require examination by impartial physician.		Disability—within 1 year after injury; excusable. Death—within 2 years after last employment and within 3 years after death.		Unlimited	Same as for accidents
NOVA SCOTIA	All diseases	Board may appoint medical board to advise on silicosis and coal miner's pneumoconiosis cases.	Disablement or death within 1 year after last employment (no limit for silicosis).	Within 6 months after injury or death. Silicosis or coal miner's pneumoconiosis—within 5 years after last employment and within 1 year after discovery of relation to employment; excusable but paid only from filing date.		Unlimited	Same as for accidents
ONTARIO	All diseases			Within 6 months after injury or death; excusable.		Unlimited	Same as for accidents
PRINCE EDWARD ISLAND	All industrial diseases		Disablement within 1 year after last exposure.	Within 6 months after injury or death.		Unlimited	Same as for accidents
QUEBEC	All diseases in schedule[3]		Disablement within 1 year after last exposure.	Within 6 months after injury or death.		Unlimited	Same as for accidents except for asbestosis or silicosis & pneumoconiosis
SASKATCHEWAN		Medical panel issues final decision on disputed medical questions.	Disablement within 1 year after last exposure.	Within 6 months after injury or death.		Unlimited	Same as for accidents
YUKON TERRITORY	All diseases	Disputes may be referred to practitioner for decision.	Death—3 years after last exposure[4]	Disability—1 year after last exposure.		Unlimited	Same as for accidents
CANADIAN MERCHANT SEAMEN'S ACT	All diseases	Disablement in the course of employment, otherwise than as a result of an accident, is compensated as for an accident.					

Longshore: In permanent partial disability claims due to occupational disease where onset of injury occurs after retirement, compensation is 66⅔% of average weekly wage times percentage of permanent impairment (according to AMA guidelines), payable while impairment continues.

B.C.: After 3 years, compensation is payable only from date of filing.

Quebec: Certain diseases are presumed caused by work exposure, as provided in schedule.

Yukon: Within 3 years after accident in such case if proof is filed with Commissioner.

Appendix II

WORKERS' COMPENSATION — TOTAL DISABILITY
MAXIMUM WEEKLY BENEFIT FOR INDIVIDUAL, NO DEPENDENTS

	MAXIMUM	PERCENTAGE OF STATE AVERAGE WEEKLY WAGE
ALABAMA	$ 290	100%
ALASKA	1114	200%
ARIZONA	204*	
ARKANSAS	154	
CALIFORNIA	224	
COLORADO	316*	80%
CONNECTICUT	381	100%
DELAWARE	232*	66 2/3%
DISTRICT OF COLUMBIA	413*	100%
FLORIDA	307	100%
GEORGIA	135	
HAWAII	291	100%
IDAHO	261*	90%
ILLINOIS	492*	133 1/3%
INDIANA	166	
IOWA	580	200%
KANSAS	227	75%
KENTUCKY	305*	100%
LOUISIANA	248	66 2/3%
MAINE	448*	166 2/3%
MARYLAND	327	100%
MASSACHUSETTS	341*	100%
MICHIGAN	358	90%
MINNESOTA	329	100%
MISSISSIPPI	126	
MISSOURI	223	66 2/3%
MONTANA	286	100%
NEBRASKA	200	
NEVADA	325*	100%
NEW HAMPSHIRE	440	150%
NEW JERSEY	269	75%
NEW MEXICO	299*	100%
NEW YORK	275	
NORTH CAROLINA	282	100%
NORTH DAKOTA	285	100%
OHIO	354	100%
OKLAHOMA	217	66 2/3%
OREGON	324*	100%
PENNSYLVANIA	336	100%
RHODE ISLAND	292	100%
SOUTH CAROLINA	287*	100%
SOUTH DAKOTA	247	100%
TENNESSEE	136	
TEXAS	203	
UTAH	TT-310 PT-264	TT-100% PT-85%
VERMONT	278	100%
VIRGINIA	295	100%
WASHINGTON	256*	75%
WEST VIRGINIA	321*	100%
WISCONSIN	321	100%
WYOMING	TT-347 PT-232	TT-100% PT-66 2/3%
LONGSHORE	580*	200% of National Average Weekly Wage
FECA	980*	

*Rounded to nearest dollar

PREPARED BY: SAMUEL A. ROTH, ASSOCIATE MANAGER, EMPLOYER RELATIONS
CHAMBER OF COMMERCE OF THE UNITED STATES (202) 463-5514

Appendix III

Chamber of Commerce
of the United States

1615 H Street, N.W.
Washington, D.C. 20062

NEWS RELEASE

FOR MORNING RELEASE
Thursday, November 17, 1983

Contact: Frank Benson
(202) 463-5682

U. S. CHAMBER BOARD CALLS ON BUSINESS TO BACK NEEDED CHANGES IN STATE LAWS COVERING OCCUPATIONAL DISEASE COMPENSATION

WASHINGTON, Nov. 16 — Individual businesses as well as business groups across the nation should work for enactment of appropriate improvements in their state workers' compensation laws governing occupational disease where needed, the U.S. Chamber of Commerce is urging its members.

At the regularly scheduled fall meeting of the Chamber's 65-member Board of Directors last week, the policy-setting arm of the business federation called on its members to back appropriate reforms of their state occupational disease laws, and to use their "best efforts" to bring about legislative enactment of such reforms.

The Chamber Board adopted this stance acting on the recommendation of its Employee Benefits Committee and the Committee's Council on Workers' Compensation. Official Chamber policy previously called on members of the business organization to "use their best efforts to see to it that workers' compensation laws are in accord with modern concepts."

An updated review of the workers' compensation field, explained Jeffrey Joseph, led the Council to the conclusion "that necessary changes (in state workers' compensation laws) will be relatively modest." The Council "has concluded that workers' compensation laws do a much better job of compensation for occupational disease than their critics give them credit for," added the Chamber vice president for domestic policy. However, it is necessary to remove the appearance of unfairness to short-circuit efforts to federalize the workers' compensation system, he explained.

The formal policy statement adopted unanimously by the Chamber Board reads:

"The Chamber of Commerce of the United States recommends to its members that appropriate reforms of state occupational disease laws be supported where needed and that its members further use their best efforts to facilitate the enactment of these reforms."

According to Eric Oxfeld, the Chamber's employee benefits attorney and staff executive for the Council on Workers' Compensation, the Chamber plans to launch a major initiative along these lines. The organization's extensive communications network will be utilized to publicize the message through letters to members, articles in the Chamber's periodic publications, programming on the organization's television and radio networks and possibly one or more conferences on the issue.

(83-328)

#####.

Appendix IV

RECOMMENDATIONS OF THE AD HOC NATIONAL BUSINESS COUNCIL ON INJURY COMPENSATION

In a technologically advanced society, individuals can be exposed to hazards that may result in acute or chronic injury due to no fault of their own. It is a long-standing tradition of American society to seek to ensure that injured individuals are cared for and appropriately compensated. The U.S. Chamber supports the continuation of this tradition as an important element of a society that places a high value on fairness and the well-being of its people.

There are numerous remedies presently available to the American public to provide compensation for injury. These existing compensation systems include common law tort liability and its statutory derivatives, statutory no-fault administrative systems, hybrid statutory and common law remedies, contractual insurance coverages, and a wide variety of taxpayer and industry financed public programs.

Viewed against their intended goals, the U.S. Chamber believes that each of these systems works reasonably well for most Americans. At the same time, improvements are needed, such as in the tort and workers' compensation systems. Also adjustments in one or more of the other systems may be appropriate to rectify specific inadequacies, and ensure that those deserving compensation, but not receiving it, do. The U.S. Chamber encourages modifications, where necessary, at the appropriate level of government, that will.achieve improvements without jeopardizing the entire foundation of these well-established compensation systems.

In determining compensation for injury, questions of causation need to be addressed. The extent to which these questions are adequately answered is a measure of both the fairness of the system for the parties involved, as well as of the degree to which the system meets society's injury compensation goals. Greater attention and effort must be applied to join the requirements of both administrative and legal compensation systems with the requirements of science in determining injury causation. The U.S. Chamber supports efforts to better clarify and refine the nexus between science and law in determining compensation and encourages its members to work with the public, the scientific community, and government to achieve this goal.

When determining modifications that may be necessary in existing compensation systems, and in evaluating the need for any new system, careful consideration must be given to the intended purposes of each and the trade-offs that may be involved in selecting among various injury compensation policy options. The Chamber offers the following principles to guide the evaluation and selection of new proposals, or modifications to existing compensation systems.

- Most existing compensation systems fall into one of two categories:
    - fault-based systems, in which individuals who are harmed by the fault of another are compensated by the wrongdoer; or
    - no-fault systems, in which individuals who are harmed are compensated without regard to fault.

  Compensation systems developed under the first category are designed to perform different functions than those of the second. These distinctions are important and should be maintained.

- The tort liability system is no longer the only means of assuring compliance with societal norms. Other societal institutions also play a significant and increasing part in setting and enforcing standards of behavior. Therefore, compensation systems should not be viewed or used as the primary means to punish, blame, or prevent socially unacceptable conduct.

- Distinctions must be made between the desire to compensate and punish harmful conduct that is wrong, and to compensate for the consequences of harmful conduct that is not wrong. Affixing blame and assessing damages to punish and deter harmful conduct where fault is not at issue are inconsistent and inherently unfair.

- Balance must be struck among the level of proof required of claimants, the amount of blame attached to defendants, and the amount of compensatory awards. A fair and practical compensation system must consider the trade-offs that exist among the often competing interests of damages allowable, proof of causation requirements, evidentiary standards, the exclusivity of remedies, and who should pay. In order for a system to be workable and fair, both plaintiffs and defendants will have to balance these choices.

- Compensation systems must recognize that, while innocent defendants should not be punished, innocent claimants may well have legitimate needs which require compensation.

- Where compensation costs are imposed on industry, there must be recognition that these extra costs may have adverse social consequences. These social consequences must be considered and balanced against the need and purpose of any new proposals or modified compensation systems. Efforts must be made to minimize aggregate costs and eliminate excessive transaction costs.

- Because financial resources are finite, the types and amounts of compensatory awards allowable under any one or a combination of compensation systems must be chosen carefully and weighed against other important resource commitments deemed necessary by society. Policy choices must recognize that resource commitments in one area may foreclose commitments in other important areas.

Mr. **Murphy**. Thank you very much, gentlemen.

We will have to adjourn here in about 3 or 4 minutes when the second set of bells rings.

You mentioned that fault and no-fault should not be mixed; that they should not be hybrid. But don't you find that in regular workmens' compensation cases, whether it be the fault of the worker, his contributory negligence, it is the compensation type benefit that he is able to rely upon? Isn't it almost difficult to separate the two? You have a worker who is in the work place——

Mr. **Alter**. Excuse me, sir, if I may interrupt in the interest of time. Please, you misunderstood. I don't want to be misunderstood. By fault and no-fault, we mean statutory fault and no-fault systems. In the tort cases, one standard of proof. As an example, that is a strictly a fault-based system. Workers' compensation with a quid pro quo, the historical quid pro quo that Mr. Roth referred to, that is a historical no-fault——

Mr. **Murphy**. No-fault.

Mr. **Alter** [continuing]. No-fault system. Without the argument of contributory negligence, somebody hurt on the job was taken care of. That is what we mean. It would be not mixing fault and no-fault automobile liability insurance. That is what I mean by not being hybridized.

Mr. **Murphy**. In other words, you are stating that if we create a no-fault or a compensation-type of situation for asbestos victims, that it should be strictly, then, a no-fault concept and should not then allow judicial proceedings beyond. Is that what you are saying?

Mr. **Alter**. Yes, sir, if it is deemed necessary to establish a new no-fault or new system of compensation system.

Mr. **Murphy**. You don't subscribe to the fact that it is necessary to do that?

Mr. **Alter**. That, let's say, is something that we are still pondering, because, as we point out in the written statement, the Wellington group, again close to resolution, and the possibility that that might work out and the other systems available. The question is hanging over us.

But what we point out—and it is not so much in your field as if I may jump for a moment to another committee's jurisdiction, in the environment field where proposals have been made where—for two-tiered systems. Now, that is a mix of the fault and the no-fault because the no-fault award would then be used to finance a fault-based tort claim. That is a bad hybridization.

Mr. **Murphy**. OK. That I subscribe to.

I thank you very much, gentlemen. We will make your statement, total statement, a part of the record and would appreciate receiving one of those reports that you have. We may not make it a part of the record in view of saving costs, but we will have it in our subcommittee library.

Mr. **Alter**. If I may, sir, I would be happy to supply two, one for either side of the aisle.

Mr. **Murphy**. We would greatly appreciate that. Thank you very much.

Thank you.

With that, the hearing is concluded.

[Whereupon, at 12:10 p.m., the subcommittee was adjourned, to reconvene subject to the call of the Chair.]

BLANK PAGE

HEARINGS ON COMPENSATION FOR OCCUPATIONAL DISEASES

TUESDAY, JUNE 25, 1985

House of Representatives,
Subcommittee on Labor Standards,
Committee on Education and Labor,
Washington, DC.

The subcommittee met, pursuant to call, at 9:35 a.m., in room 2257, Rayburn House Office Building, Hon. Austin J. Murphy (chairman of the subcommittee) presiding.

Members present: Representatives Murphy, Williams, Petri, and Bartlett.

Staff present: Thomas Lamb, staff director; Richard Fiesta, counsel; and Bruce Wood, minority labor counsel.

Mr. Murphy. Good morning. I'm sorry I'm a few minutes late—trying to answer one too many phone calls.

For several years, the Subcommittee on Labor Standards has studied the issues surrounding occupational disease in an attempt to establish a fair and workable system of compensating unknowing victims.

It has become increasingly apparent that the tort system is not capable of handling the thousands of cases filed each year. Currently, 25,000 to 30,000 cases are pending in State and Federal courts seeking damages for asbestos-related diseases alone, and 500 new cases are being filed each month. The result is that deserving claimants are forced to wait several years before being compensated, if at all.

In previous hearings, the subcommittee has heard testimony from asbestos product manufacturers, organized labor, victims' groups, insurance organizations, and other interested parties. It is obvious that the asbestos industry has a clear responsibility to compensate these victims.

This morning, the subcommittee will focus on allegations that the Federal Government shares responsibility for this asbestos tragedy. As early as 1918, the Federal Government recognized the hazards of exposure to asbestos. However, in 1982, the Government was still specifying its use.

In order to create an equitable system of compensation, it is essential that all responsible parties contribute. The Government's $5.75 million settlement of a 1978 asbestos lawsuit and more recent findings of Government liability in a Massachusetts lawsuit suggest that when its special protections are not available, and it is judged on its merits according to the same criteria as are applied to the private sector defendants, the United States does bear a responsibility. It is unfair for the Government to avoid responsibility simply by stating immunity as sovereign.

An essential question in the debate of the Government's role in this matter is, what did the Federal Government know about the hazards of asbestos exposure, when did the Government know it, and what did the Government do with this knowledge?

Our first witness—and we thank you for coming—is Mr. Robert Willmore, Deputy Assistant Attorney General of the Civil Division of the U.S. Department of Justice.

Mr. Willmore.

STATEMENT OF ROBERT WILLMORE, DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. WILLMORE. Good morning.

I am pleased to appear before the subcommittee today in connection with its oversight hearings on the state of the asbestos litigation.

As the members of this subcommittee are well aware, there has been an extraordinary increase in recent years in the number of asbestos-related lawsuits filed in Federal and State courts throughout the United States.

The United States alone is involved in over 3,000 lawsuits involving 90,000 indemnification and contribution claims. It should be noted that only a handful of claims involve lawsuits brought against the United States by asbestos victims. The vast majority of the claims against the United States have been brought by asbestos manufacturers who seek to pass their liability onto the taxpayer through various theories of indemnification or contribution. To date, the manufacturers have been uniformly unsuccessful in this endeavor.

The stakes for the asbestos manufacturers in successfully passing their liability onto the United States are immense. Some estimates place the total litigation liability of the manufacturers and their insurers in the range of $30 to $40 billion. Some even suggest that these estimates may be low, particularly in light of the growing damage awards, including punitive damage awards, of recent years.

The manufacturers, accordingly have devoted considerable litigation resources to drawing the United States into the growing morass of asbestos litigation, and their attorneys have devised numerous innovative legal theories to support their clients' claims that the United States, rather than they, should bear the primary burden of compensating asbestos victims.

As I have noted, the courts to date have quite properly rejected the manufacturers' claims against the United States both on legal as well as factual grounds. Thus, the manufacturers are now before Congress, seeking to obtain through legislation what they have failed to win in litigation, ironically, using the very same arguments and assertions that have been rejected by the courts.

The manufacturers have asserted that they will eventually prevail against the United States and have suggested that they already would have prevailed were the United States a private party.

It is, of course, always possible to claim that one will eventually prevail in litigation. It should be noted, however, that in the nearly 100,000 claims involving the United States, the United States has been found liable with regard to only one claim, which presently is on appeal, and, as you know, under the Federal Tort Claims Act, the United States is subject to applicable State tort law.

The assertion that the United States would be liable in these cases were it a private party is particularly misleading in that it fails to recognize that the very bases of liability asserted by the manufacturers in their indemnity and contribution suits often involve activities uniquely governmental in nature.

For example, many of the manufacturers' legal arguments amount to little more than their assertion that the Federal Government should have used its various powers to prevent them from committing the acts which they knew at the time were endangering the health of asbestos workers.

This assertion is particularly difficult to accept in light of the evidence unearthed in discovery demonstrating how some of the manufacturers intentionally failed to disclose their knowledge of the hazards of asbestos to their own employees, other asbestos workers, the medical profession, and of course the Federal Government.

I am also unaware of any evidence to support the often asserted claim that a large majority of asbestos victims were exposed to asbestos while working in Government shipyards or refitting naval vessels. To the contrary, while there undoubtedly are such cases, they represent only a portion of the asbestos claims and certainly less than half.

It should be noted in this regard that civilian employees injured by exposure to asbestos in public shipyards are entitled to relatively liberal workers' compensation benefits under FECA. As is the case for private employers, that should be the extent of Government liability.

Asbestos is used in over 3,000 products commonly found in the home and many work environments, including insulation products, floor tiles, textiles, fireproof drapery, heat-resistant surfaces, acoustical ceilings, decorative building panels, plaster, and stucco.

The tort liability of the industry is predicated upon its wrongdoing in continuing to market these products while actively concealing what it knew about pertinent hazards and while failing to divulge its lack of testing and investigation. The success or failure of these claims focus on the manufacturers' failure to warn; the site of the exposure, or the particular asbestos-bearing product involved, is largely irrelevant.

The manufacturers have placed great emphasis on the use of asbestos in Navy ships during and after World War II. By World War II, the Navy indeed relied upon asbestos-containing insulation products. These products had been developed by the industry and touted to the Navy, and other industrial users, for their ability to satisfy desirable performance characteristics.

Industry also purported to show the Government how to use these products properly and safely but never gave a clue that it had reason to believe the products to be harmful. It certainly never disclosed that it was concealing information about the hazards of asbestos, and of course industry did virtually nothing toward developing safe substitutes.

In the post-war years, the Government disposed of surplus asbestos fiber by sale under a statutory mandate to prevent avoidable costs. In implementing this instruction, the surplus fiber was sold only to sophisticated manufacturers well acquainted with the product. These manufacturers were not only far more knowledgeable than the Government concerning the hazards of asbestos but were also subject to statutory obligations to provide their employees with safe workplaces.

The Government assumed that the purchasers of the stockpiled asbestos would meet these obligations and until much later had no reason to believe that they were not even trying. Moreover, the amount of asbestos fiber sold by the GSA was only a small fraction of the total sold in the United States during the relevant period.

In sum, the assertions of the manufacturers which purport to establish the predicate for Government liability for compensating asbestos victims vastly exaggerate and distort the role of the United States.

Several years ago, Manville's chief executive officer stated that the lack of any punitive damage awards against the company was the best evidence that it had acted innocently. As of today, we know of at least 18 punitive damage awards against Manville alone and more punitive damage awards against other manufacturers.

This appalling history of corporate irresponsibility led one court to comment that a jury was justified in concluding that a defendant manufacturer's conduct "amounted to a wanton disregard for the health and safety of persons using its asbestos products and evinced a reckless indifference to the potential consequences of its deliberate business decision not to warn the users of its products to take some measures of protection from the potentially harmful effects of prolonged exposure to excessive amounts of asbestos dust and fibres."

In assessing the role and responsibility of the Federal Government in this area, it should always be kept in mind that the Government already bears significant costs related to injuries resulting from asbestos exposure. Programs such as FECA, Social Security disability, Medicare/Medicaid, veterans' disability and health care services, and a variety of other health and income maintenance programs provide substantial benefits to individuals who were injured by asbestos. Many of these individuals may not even suspect that their health problems were caused by asbestos. Others may suspect but may not have the evidence, the resources, or the determination to pursue judicial remedies. Yet they nevertheless receive benefits from the Federal Government.

While it is difficult to estimate the asbestos-related cost to the taxpayer through these programs, we believe it to be, at minimum, in the hundreds of millions of dollars every year. It should never be forgotten that much of this cost to the Government, like much of the terrible human tragedy, could have been avoided had the asbestos manufacturers met their moral and legal duty to disclose what they knew of the dangers of asbestos exposure.

This concludes my statement. I will be pleased to answer any of your question.

Mr. **Murphy**. How long, Mr. Willmore, have you been in your capacity with the General Torts Division?

Mr. **Willmore**. I have been there for about a month. Before that, I was with the Office of Management and Budget for about 2½ years.

Mr. **Murphy**. So you haven't been personally involved in any of this asbestos litigation to this point?

Mr. **Willmore**. I haven't tried any cases. I don't think any of the deputies in the Tort Branch have. On the other hand, both in my capacity in Justice and at OMB I have been involved in the asbestos problem from a policy standpoint and from a broader litigation strategy perspective.

Mr. **Murphy**. Do you know approximately how many administrative claims against the U.S. Government have been filed?

Mr. **Willmore**. I believe there are approximately 8,600 FECA claims.

Mr. **Murphy**. Eight thousand, six hundred FECA claims?

Mr. **Willmore**. That figure is the most recent one we have, and I believe it dates back to December 1983. I don't think we have anything more recent than that.

Mr. **Murphy**. Do you know how many have been filed in tort—in litigation?

Mr. **Willmore**. In court? Well, no one really knows. Do you mean against the Government?

Mr. **Murphy**. Yes.

Mr. **Willmore**. Against the government by asbestos victims?

Mr. **Murphy**. Yes.

Mr. **Willmore**. Less than 100. We estimate probably somewhere between 50 and 100, maybe even less than 50.

Mr. **Murphy**. Then, in addition to that, the Government would have been joined as an additional defendant in other suits?

Mr. **Willmore**. That's right. The Government has been sued by the manufacturers and suppliers, and here the claims multiply.

Mr. **Murphy**. Have they been sued by the manufacturers, or are they being joined as a codefendant in a suit by claimants against the manufacturer?

Mr. **Willmore**. Both, I think.

In claims court, for example, the manufacturers and suppliers are suing the Government directly, and there are tens of thousands of cases. There is one case in claims court that involves, I think, 48,000 claims. In other tort cases the manufacturers are impleading the Government, as a codefendant. They are impleading the Government on indemnification or contribution theories.

Mr. **Murphy**. It is my understanding that none have been granted or settled of these suits. Is that right?

Mr. **Willmore**. I'm sorry, which suits?

Mr. **Murphy**. None of the administrative claims have been settled—the FECA claims.

Mr. **Willmore**. I believe there have been some FECA awards for asbestos exposure. I may be wrong, but I have been under the impression that there have been FECA awards for asbestosis at least.

Mr. **Murphy**. In September 1982, an assistant attorney general, Paul McGrath, told the subcommittee at that time that the Justice Department automatically denies administrative claims for damages arising from Government use of asbestos. Is that policy still in force?

Mr. WILLMORE. Oh, I'm sorry. We may be talking about two different things. I think Mr. McGrath was referring to administrative claims brought under the Federal Tort Claims Act I don't think he was referring to administrative claims brought under FECA. Justice doesn't have any role in denying FECA claims.

Yes, I believe we have denied all the claims brought under the administrative portion of the Federal Tort Claims Act.

Mr. MURPHY. Doesn't this policy prevent asbestos plaintiffs and manufacturers from seeking court relief, and isn't this policy the exact reason why legislation is necessary?

Mr. WILLMORE. Absolutely not. All the administrative claims procedure in the Federal Tort Claims Act is, is a settlement process where the claimant comes in and makes his claim administratively. The agency then negotiates with the claimant, and if the negotiations don't result in a compromise settlement the claimant is free to file an action in Federal district court in the appropriate State seeking tort remedies from the United States under the Federal Tort Claims Act.

Mr. MURPHY. In other words, the Government can treat different claimants in different ways as the individual Government agent sees fit. A negotiation is only what you might offer and what the claimant might accept, and it could certainly lead to an uneven approach in handling different claims.

Mr. WILLMORE. I don't disagree with you that that is a problem for all of tort law. It's not just that the administrative claims under the Federal Tort Claims Act—all of tort law, to some extent, involves an uneven approach. Tort law is not uniform. Some people get very high benefits, other people get nothing.

Mr. MURPHY. That is the very point that I'm trying to make, that some claimants may get nothing and some may get a very high award, and don't you think it would be fair to have an even-handed approach, and, therefore, we would need legislation?

Mr. WILLMORE. Well, it depends what you mean by an even-handed approach. Let's say a claimant doesn't have any evidence to support his claim. Maybe he makes a claim that he has an asbestos-related disease but there is no evidence of causation. In that kind of a situation, you wouldn't want the claimant to receive anything.

Even Workers' Compensation, which is not the tort system, is not entirely even. Some workers file Workers' Compensation claims and get nothing. Others file Workers' Compensation claims and get a lot. It depends on the basis of the claim.

Mr. MURPHY. I agree with you, if they are unable to prove their claim, that's not being uneven. But when you totally negotiate a settlement, it isn't even Workmen's Compensation. Workmen's Compensation is, if you prove you have a work-related injury, then you are entitled to x number of benefits.

Mr. WILLMORE. Sure.

Mr. MURPHY. That's not the way it is in tort, nor in the claim process that we are discussing, where you negotiate.

Mr. WILLMORE. Well, the claims process replicates the tort process in a sense that the Government, if it offers a settlement, offers a settlement on the basis of the tort process. In other words, essentially the same criteria that it would apply in settling a case once the case has been filed, largely are applied in the administrative process under the Federal Tort Claims Act.

Mr. MURPHY. OK. Before you became associated with the Department of Justice, or probably the administration, in 1978 the Justice Department settled an asbestos lawsuit in Tyler, TX, by agreeing to pay over $5 million to a group of plaintiffs.

If the Government has no liability, why do you suppose the Government settled in this regard awarding some claimants in Tyler, TX, and yet stand fast on their policy today to deny benefits?

Mr. WILLMORE. Of course, I was not with the Department of Justice at the time, and the information I have is second-hand and third-hand. What led the Government to settle the case has been written about extensively. Recently, for example, there was some pertinent discussion in an article in The New Yorker.

It is my understanding—and, again, I want to emphasize, this is second- and third-hand information—that the Department of Justice consistently asserted both on factual and legal grounds that it had no liability in the case.

It settled the case, however, because of tremendous pressure placed on the Government by the judge and by other parties to join the settlement. I think the Department of Justice, or at least the officials of the Department of Justice, made a litigation strategy decision that, given the pressure they were facing, and given the relatively modest amount of money which was being requested of the Government in the case, that they were better off settling even though they felt they had no liability, than going to trial and devoting considerable litigation resources possibly before a very hostile judge—the hostility perhaps the result of the Government's failure to settle—and being involved in a litigation which could drag on for years.

I think it was a litigation strategy decision, in other words. I do not think it was a decision having to do with their perception that the Government was liable on the facts or the law.

Mr. MURPHY. OK. That's your thought and your belief. The factual justification, that the department would have given Congress for the settlement of this case, and of course giving Congress because an appropriation is necessary for the Department of Justice to settle claims. I'm sure that the department has records of this justification. Could you attain those for us and send them to the committee?

Mr. WILLMORE. Sure.

Mr. MURPHY. In the Tyler case, what justification was presented to Congress at that time? I would like to know what role the Government felt it played in liability in order to justify the settlement of the case.

Mr. WILLMORE. Let me try to clarify something. I do not believe—maybe I'm wrong, and maybe I just misunderstand your question—that the Department of Justice had to seek an appropriation or justify this to the Congress. The money comes from the judgment fund, which is a permanent appropriation. So I'm not sure I fully understand.

Mr. **Murphy**. And it usually has an internal accounting of the reasons for spending that money.

Mr. **Willmore**. I believe something is sent to the General Accounting Office.

Mr. **Murphy**. Yes.

Mr. **Willmore**. I can get you that.

Mr. **Murphy**. Right. This is what we would like to have.

In a second Tyler settlement, the Government paid no money but agreed to litigate claims for asbestos plaintiffs in an international court, I believe, to bring in South African producers. Why was such a settlement reached a second time if you assert no liability? Do you know?

Mr. **Willmore**. Again, we asserted and continue to assert very strongly that there is no liability. This involved a trial. The Department often enters into settlements as a matter of litigation strategy. Because we have limited resources, we can't try all cases we are involved in. We often enter into settlements where we, in effect, get out of the case but do not concede liability.

In this case, the plaintiffs and the other defendants indicated that if the Government would pursue the international claims which they were having a very hard time pursuing, and with regard to which the Government had an advantage, they would not pursue the issue of Government liability.

We considered it, and we decided that this proposal seemed to be, from a litigation strategy standpoint, a fair resolution. It got us out of a case that would have required an investment of substantial resources for a considerable time. That was the reason for the Government's decision to enter into that agreement.

Mr. **Murphy**. I again submit to you that that's my point. In order to eliminate the unfairness, the person who perseveres in his litigation and brings everybody in ultimately costs you enough that you are willing to pay, and of course that's the tort system.

In the meantime, thousands of litigants are out there waiting in line to either sue or not to sue, as the case may be, and what you are telling me is, yes, we're willing to pay millions to the guy that finally backs us up to the wall and is costing us money in court, but we're not willing to participate in an equitable compensation fund.

I don't say that people who do not have asbestosis should claim anything under either system, neither in compensation nor in tort.

But, again, when we are talking about the Government participation in legal settlements in court, it indicates to me that the Government is then accepting some portion of responsibility.

Now, there have been thousands of claims filed in the U.S. courts under the Federal Tort Claims Act. Isn't that correct?

Mr. **Willmore**. Yes. There have been thousands of claims by the manufacturers.

Mr. **Murphy**. Yes.

Mr. **Willmore**. Do you mean asbestos cases?

Mr. **Murphy**. Asbestos cases, yes.

Mr. **Willmore**. Yes.

Mr. **Murphy**. Now, how many of those cases have actually been tried?

BEST COPY AVAILABLE

Mr. **Willmore.** I do not know how many have been tried. Part of the problem is that a lot of these cases are being tried in the motions context, in the sense that there are motions for summary judgment, motions to dismiss, with hearings on the motions. I do not know whether one would refer to such hearings as trials in the context of your question.

Mr. **Murphy.** Let me then assist you, since you have had a limited time with Justice. We have been advised that in *Shuman* v. *United States*, a Massachusetts case, the only one that has been tried——

Mr. **Willmore.** I don't know if that is correct.

Mr. **Murphy** [continuing]. Actually gone to trial.

In that case, the shipyard was a private one owned by Bethlehem Steel. What are the implications regarding Government liability if it is upheld? Justice has claimed that it was an act of discretion not to enforce its minimum requirements directive of 1943, a contention which was lost in the court below. Perhaps you could review that case and give us your opinion after you have had an opportunity to read it.

Mr. **Willmore.** I have read *Shuman.*

As you know, Mr. Chairman, I cannot discuss cases that are still in litigation because it would prejudice the Government's position; *Shuman* is on appeal, and both sides have filed briefs. I'll be more than glad to send those briefs to the committee. Since they are public documents, I don't think that would prejudice the position of the United States in the pending appeal. We assume that the appeal will be decided in the very near future.

Mr. **Murphy.** OK.

In one portion of your testimony, you indicate that the Government had knowledge; the Government had specifications, I assume; and the Government also had a surplus stock of asbestos that it took upon itself to sell.

Now, did the Government have professional industrial hygienists in the 1930's and 1940's who presumably were competent and knowledgeable in areas like asbestos exposure? I would assume that we did.

Mr. **Willmore.** I assume that the Government did. On the other hand, I don't think the Government had anywhere near the knowledge that industry had, and the Government was not in the same position as industry. Nor did it have the overpowering incentive that the industry did to obtain the state-of-the-art evidence on the health effects of asbestos exposure.

Mr. **Murphy.** I don't want to defend the asbestos industry. I think they share a great responsibility and any legislative remedy we might draft is certainly going to include them and their portion of the responsibility. They have advised us in their testimony that they had alternate products that they offered to the Government, but the Government rejected those products at various times, and the Government consistently requested that asbestos be used in the construction of ships and of course when you mention incentive, the incentive in 1940, 1941, to 1945 was clear; the incentive was to build as many ships as inexpensively and as rapidly as possible.

Mr. **Willmore.** I have to disagree with that very strongly.

The industry came in and sold asbestos to the Government. It was the one that came to the Government and said, "Listen, you have a problem. What you need is asbestos."

I have some of the old sales documents that were used back then to, in effect, sell the Government on asbestos. Nowhere in those documents is there any mention of the health problems of asbestos. They are basically puff pieces about how great asbestos is, how useful it would be to the Navy, and why the Government should use asbestos. At the same time this was occurring, the industry was engaged in activities to prevent the disclosure of evidence or knowledge at the time about the health effects of asbestos.

Mr. **Murphy**. Do you have some proof of that allegation——

Mr. **Willmore**. Absolutely.

Mr. **Murphy** [continuing]. That you could provide us with?

Mr. **Willmore**. Yes, I can provide——

Mr. **Murphy**. We would be interested to see that.

Mr. **Willmore**. I can provide you today with a court decision. This is one of the cases that was tried but which did not involve the Government—*Johns-Manville* v. *Janssens*, in which the court—a State appellate court—upheld a punitive damage award against Johns-Manville.

The court, in effect, found a significant coverup over a long period of time, starting in the late 1920's and early 1930's and going all the way into the 1960's, in which Johns-Manville covered up the dangers of asbestos not only from its own employees but from other asbestos workers and from other governments, not just the Federal Government but also the State governments.

I'll be glad to leave copies of this decision with the subcommittee.

Mr. **Murphy**. OK. We would like to have that decision.

[Information referred to above, retained in subcommittee files.]

Mr. **Murphy**. Getting back to the Government's responsibility. We have been advised—unless you can prove it is incorrect—that documents such as the March 11, 1941, memo from the Navy's chief of preventive medicine to the Navy surgeon general, Ross McIntyre, stating that the Navy was not protecting workers from asbestos as it should, and the 1943 Navy insurance manual in which asbestos is identified as one of the seven or eight most frequently encountered shipyard diseases.

Now, you can sit there as a Government agent and blame it on the manufacturers, but if the Government knew from its own resources, its own personnel in 1941, 1943, and 1945, don't we have some responsibility?

Mr. **Willmore**. I think you really have to look at what all the parties did. If you compare the situations of what the Government knew and what the Government was engaged in at the time, and what the manufacturers knew and what they were doing at the time, I think the answer is that the responsibility lies with the manufacturers.

The Government was not engaged in a coverup. The Government was not trying to keep workers from finding out about the dangers of asbestos exposure. The manufacturers were, and to a large extent the manufacturers were doing that because they were afraid of their own employees finding out about the dangers of asbestos exposure and filing Workers' Compensation claims, or, before Workers' Compensation, filing tort claims.

Now, what the manufacturers are claiming today is that if only the Government had used its police powers to prevent them from doing what they did at the time, which they knew to be wrong—morally and legally wrong—none of this would have occurred.

But I don't think that means the responsibility lies with the Government. The manufacturers were the ones who failed to disclose, and the fact that the Government did not remedy their wrong does not shift the responsibility to the Government.

Mr. **Murphy.** No, we don't intend to have that responsibility shifted, but I would think that if there is a responsibility, that it would be shared rather than shifted.

In the memorandum I referred to, there is one particular paragraph wherein the commander mentions that they think it best policy not to mention it because it might cause disturbance in the labor element. This is 1941. The Government intentionally withheld the information. You just blamed it all on the manufacturers and yet we have a copy of a Government document where the Government deliberately withheld because it didn't want labor unrest.

Mr. **Willmore.** Mr. Chairman, I have not seen the document. I will be glad to look at it and to respond to it.

We are talking about entirely different degrees of activities on the part of the manufacturers and the Government.

For instance, in the *Janssen* case, a copy of which I have left for you, one of the practices which the judge notes in upholding punitive damage awards against the manufacturer—in this case, Johns-Mansville—was what one witness described as the "hush-hush policy." This was a policy where, once the company x-rayed a worker, if it found the worker had asbestosis, it would not tell the worker, but would send him back to the plant to be exposed to even more asbestos. The reasoning for the policy was that it was in the best interests of the worker not to know about his or her asbestos disease. That is a completely different kind of activity than what you have just referred to.

I will be glad to look at this memorandum, and I will be glad to respond to it, and will get you a response back in a few days. But I think if you look at what the manufacturers did in the 1930's and 1940's, you will find that they had a concerted effort to keep the public and the Government from becoming aware of what they knew about the dangers of asbestos exposure and what they knew to be a growing body of information about what asbestos would do to workers exposed to it.

Mr. **Murphy.** You mentioned degree, and I agree with you that we have degrees of responsibility. Certainly the Government has some degree of responsibility. The Government has accepted that degree in the settlement of a case.

Mr. **Willmore.** In the *Tyler* case?

Mr. **Murphy.** Yes.

Mr. **Willmore.** Well, again, I want to emphasize that, as far as I know—and I've never seen anything to the contrary—the Government has never stated that it has a legal or, for that matter, a moral liability in the *Tyler* case.

Mr. **Murphy.** What did we pay for?

Mr. **Willmore**. The payment was made a matter of litigation strategy. I do that all the time when a case comes across my case, and I recommend the approval of a settlement. While I think we can win the case, I settle the case because the amount of money is a reasonable amount of money, and to try the case means that I have to take very limited litigation resources that I have and——

Mr. **Murphy**. That's the very point that I'm trying to make rather than go through all these expensive litigation cases, as a civil litigant attorney, you pick and choose who is going to get paid, regardless of the degree of responsibility and regardless of the degree of the disease, because you have told me that you settle the case based on strictly how much is it going to cost to try this suit? Let's pay them off and get rid of a suit.

I have tried suits the other way, and I've settled when I've thought maybe it was inadequate, but it's a bird in the hand approach.

Mr. **Willmore**. Let me answer that. I want to emphasize again that we are talking about a single decision that was made in a previous administration before they recognized what the asbestos litigation was all about. I don't know whether that same decision would have been made in this administration.

Mr. **Murphy**. OK. Mr. Bartlett, do you have some questions?

Mr. **Bartlett**. Thank you, Mr. Chairman.

I have a set of questions, and I apologize for missing part of the testimony. I'm in and out of another hearing that I have to attend to.

Let me try to approach it from another direction, and that is, the current system we have now, which is essentially the court system, you have seen the statistics—a billion dollars or so paid out, 37 cents on the dollar going to the recipients. There is no satisfaction in anybody's mind with the system that we have now.

Mr. **Willmore**. Right.

Mr. **Bartlett**. Has the administration, or will the administration, make any recommendation to somehow get us out of the tort system, or the nonsystem, and, if so, what will that recommendation be, and when will it arrive? Will the administration make a recommendation to move toward an administrative compensation system?

Mr. **Willmore**. I cannot tell you exactly what the administration will do. I will tell you this. The issue is one that the administration is very aware of. We have met with the asbestos manufacturers and with their representatives. We have discussed the matter with them, and it is one where we know there are problems and that the problems need to be solved in the future.

Right now, part of the difficulty of any legislative effort is that there are too many interest groups seeking something out of the legislation other than solving the asbestos litigation crisis. The manufacturers look at this as an opportunity for bailout legislation. Quite frankly, organized labor sees this as an opportunity to federalize Workers' Compensation. The tort lawyers are in there trying to make sure that their legal fees are not in any way reduced and that they continue to get their one-third or 40 percent contingency fees.

As long as those forces are as effective as they seem to be today, any effort at enacting legislation is going to be futile. Such legislation will satisfy the needs of this or that interest group, but it is not going to be directed at the problems we have in the asbestos litigation.

Mr. **Bartlett**. Who has the lead within the administration?

Mr. **Willmore**. I would say the Department of Justice.

Mr. **Bartlett**. Which Assistant Attorney General would have the lead?

Mr. **Willmore**. It would be the Assistant Attorney General for the Civil Division. Currently, that is Richard Willard, who is acting in that capacity.

I would also say that the Office of Management and Budget and the Department of Labor, obviously, also have significant roles in this.

Mr. **Bartlett**. As one Member of Congress, I have a great deal of frustration over congressional and the administration's lack of progress. There seems to be some modest amount of progress with the Wellington group being signed and such as that, but that was a 2½-year negotiation.

Mr. **Willmore**. Right.

Mr. **Bartlett**. And it's still a voluntary agreement. A billion dollars in settlements and 37 cents going to some of the recipients after a great deal of agony seems to me to be—we have an old saying in east Texas, "If it ain't broke, don't fix it." I haven't heard anyone apply that saying to this particular problem. So I have some concerns.

There are two problems, as you said. One is the system for paying the legitimate claims, and the other one is who shall pay. So there are two separate decisions that have to be made. What is the administration's position as to the system?

Mr. **Willmore**. There are two different ways in which asbestos victims are now receiving compensation. One is through the tort system, and the other is through a variety of different Government compensation systems, not just FECA and other workers' compensation systems but also Social Security, Medicare/Medicaid, and a variety of other programs.

One of the points I want to emphasize is that we don't know exactly what the Government is already paying to people who have asbestos-related diseases, but we think it's certainly in the hundreds of millions of dollars: It may be in the billions of dollars, and it may be a lot more than the manufacturers are paying on an annual basis through the tort system. So the Government is already paying a lot.

Mr. **Bartlett**. What conclusion do you reach from that?

Mr. **Willmore**. One conclusion I reach from that is that, to the extent anyone argues there is a moral responsibility on the part of the Government, I would point out that the Government already is paying a lot of the taxpayers' money to asbestos victims.

Now, a lot of these people may not even know they are asbestos victims. They may have lung cancer. They may have no idea that the lung cancer was caused by asbestos, or they may think maybe they were asbestos victims, but they may not have the evidence.

Mr. **Bartlett**. What conclusion do you reach from that vis-a-vis changing the system or leaving the present tort system in place?

Mr. **Willmore**. I think the tort system itself is unacceptable as it now stands. The crisis is one that is serious and is going to get worse over time, as property claims start coming in, and as we maybe even get a third generation of asbestos litigation by people who are exposed to asbestos in consumer products in their homes and in other situations. We have not seen much in the way of asbestos litigation from that area. But that will come, in our opinion.

I think some things can be done and, hopefully, will be done in the future. Maybe an administrative compensation system is not the way. Maybe what we need to do is to reform the tort system, either generally or specifically as to asbestos cases.

The administration has in formal conversations indicated that it is sympathetic toward this idea, that it is willing to pursue something along these lines. But every time we have tried to go down this path, we have always been met by the fact that the interest groups involved are not that interested in reforming the tort system and reforming the problems, which are major social problems, but are interested in getting a piece of the pie. The manufacturers want a Federal contribution of 50 percent or more. Organized labor is still looking at this as a way to federalize workers' compensation. And the tort lawyers are trying to protect their attorneys' fees.

Until we get through that barrier and until we look at the problems which exist in court and try to solve those problems and that may be unpopular legislation which it may be difficult to pass, because the interest groups involved in this may not be satisfied—until we get to that point, I think any legislative effort is going to be futile.

There are things that can be done and, in my opinion, should be done. But it is going to take that kind of determination by both the administration and Congress.

Mr. **Bartlett**. What would you estimate that we are now spending per year just on legal fees?

Mr. **Willmore**. Just on legal fees?

Mr. **Bartlett**. Legal costs.

Mr. **Willmore**. You mean to the Department?

Mr. **Bartlett**. No, no. By the Department.

Mr. **Willmore**. About $10 million a year. Next year we will be spending about $11 million—in fiscal year 1986, we will be spending about $11 million.

Mr. **Bartlett**. About $11 million a year. Are there more costs than that involved?

Mr. **Willmore**. That is to the Department of Justice. There are some costs involved in the administrative claims process in the Navy and Labor. We think that those are probably less than $1 million. So we are pretty confident that our legal expenses for the entire Government are somewhere between $10 million and $15 million.

Mr. **Bartlett**. I'm trying to remember—and maybe you could help me—a line item in an appropriation somewhere that was in the range of $150 million.

Mr. **Willmore**. There is a GAO review currently underway of the expenses of the asbestos litigation, and I reviewed those documents over the weekend. The documents indicated that the cost to the Department was in the area of $10 to $11 million.

Mr. **Murphy**. If the gentleman would yield.

Mr. **Bartlett**. I yield.

Mr. **Murphy**. Didn't the Department advise GAO that they faced a potential $150 million claim?

Mr. **Willmore**. That may be. In fact, if you add together all the claims that have been made against the Federal Government, it is more.

Mr. **Murphy**. The Justice Department itself estimated that.

Mr. **Willmore**. Well, that may be. I'm not sure I'm following this.

Mr. **Bartlett**. Mr. Chairman, I'd ask unanimous consent that we hold the hearing record open on that point.

Mr. **Murphy**. OK.

Mr. **Bartlett**. The specific question is, essentially, leaving aside the compensation, FECA, and Social Security—the specific question is, what is the Government spending now on asbestos litigation?

Mr. **Willmore**. OK.

Mr. **Bartlett**. The whole range of costs, including claims payments, costs to the Department of Labor, costs throughout the Government and at the Department of Justice, and what would we expect to pay in the future.

On the issue of sovereign immunity, first let me see if I understand it just as a layman. The Government's involvement was to sell its stockpile and to specify these products in the shipyards. Am I oversimplifying?

Mr. **Willmore**. Those are some of the claims that the manufacturers have made against the Government. They have made a variety of legal arguments.

Mr. **Bartlett**. Leaving aside the legal claims, is that true—we did sell asbestos out of our stockpile?

Mr. **Willmore**. From the mid-1960's to the mid-1970's—in fact, I think I have the exact number—we sold approximately one-hundredth of the amount that was sold in the United States during that period—one one-hundredth, approximately.

Mr. **Bartlett**. That was a period of what?

Mr. **Willmore**. From about the mid-1960's to the mid-1970's.

Mr. **Bartlett**. Did we have stockpiles prior to that that we sold from?

Mr. **Willmore**. I think the stockpiles go back to about World War II.

Mr. **Bartlett**. Do you know what we sold—what percentage was sold during World War II or prior to that?

Mr. **Willmore**. No, I do not know. I do not know whether we sold anything between World War II and the mid-1960's. While there has been extensive discovery on this issue, I have never seen anything on that.

Mr. **Bartlett**. I ask unanimous consent that the record be held open for that also.

Mr. **Murphy**. Without objection.

Mr. **Bartlett**. So as I understand, just in laymen's terms, the fact is that we sold asbestos out of the Government-held stockpile.

Mr. **Willmore**. That is correct.

Mr. **Bartlett**. And, in addition, that the Government specified asbestos in the products that we were building, whether Government-operated shipyards or other contractor-operated, under the auspices of the Government.

Mr. **Willmore**. That is correct.

Mr. **Bartlett**. Then the question becomes as to whether that should accrue liability to the Government, but as far as those two facts, those are facts.

Mr. **Willmore**. Yes. I would add to the second one that those specifications were drafted with the industry. Those were not just Government specifications out of the blue.

Mr. **Bartlett**. Moving from there to the question of sovereign immunity, is it only the sovereign immunity statute that is preventing the Federal Government from having liability for these health claims, or is it something else? If the Government didn't have sovereign immunity, would we be liable?

Mr. **Willmore**. I think it is a variety of things. First of all, of course, the Government has waived its sovereign immunity under the Federal Tort Claims Act, and what it has left is really only one defense to which I think you are referring, which is the discretionary function defense. That defense, in effect, provides that if the Government is doing something that is discretionary, it will not be held liable under the Federal Tort Claims Act.

In some of these situations, that is a defense that has been raised. There are also a number of factual defenses that have been raised as far as the Government's responsibility. So it is one of the defenses, but it is not the only defense.

Mr. **Bartlett**. The Government has waived sovereign immunity?

Mr. **Willmore**. Yes.

Mr. **Bartlett**. In all of the cases?

Mr. **Willmore**. In 1946 or 1947, the Congress passed the Federal Tort Claims Act, which is a waiver of sovereign immunity—or you can refer to it as a partial waiver of sovereign immunity—for all tort claims filed against the United States. The act sets out specific defenses—about 10 or so defenses.

The defense that I think you are referring to is what is called the discretionary function defense, which is something that the Supreme Court has recognized. The defensive arguably is even within the constitutional framework of our Government. That is, that the executive branch has to have a discretionary function defense. At least, that has been argued.

When Congress enacted the discretionary function defense, there were some in Congress who said that enactment of the defense was not even necessary—that the defense is understood to be part of our constitutional system. But the defense was nevertheless enacted as part of the Federal Tort Claims Act.

Mr. **Bartlett**. So if it were not for those defenses that were set up as an extension of sovereign immunity or as an exception——

Mr. **Willmore**. An exception.

Mr. **Bartlett**. Then, if the Government were merely a private supplier, would the Government be liable for these claims?

Mr. **Willmore**. You see, that is part of the problem. The asbestos manufacturers like to argue that if the Government were a private party, it would be liable. But the problem is, the Government is doing things that no private party would ever do. Why would a private party stockpile asbestos for no profit? That does not make any sense.

The Government was providing a service, in effect, to the industry by making sure that there was a continuous supply of asbestos available, and, in case of any shortage—from an embargo or whatever—that the asbestos would be there, if needed by industry. We sold the asbestos, in effect, to industry. We did not sell it to the consumers, like the manufacturers, in many instances, did. We were providing a Government service.

I want to reemphasize, we are talking here about one one-hundredth of the total amount of asbestos that was consumed during that relevant period. Now, the manufacturers turn around and say, "Because the Government was providing a service to us by stockpiling asbestos and ensuring that there would be no shortage, the Government should be liable for the injuries that were caused by our failure to disclose the dangers of asbestos to workers."

Mr. **Bartlett**. Thank you, Mr. Willmore.

Thank you, Mr. Chairman.

Mr. **Murphy**. Thank you, Mr. Bartlett.

The discretionary action defense was used in the Shuman case; isn't that right?

Mr. **Willmore**. Yes, it was one of the defenses that was raised.

Mr. **Murphy**. And you lost in the lower court.

Mr. **Willmore**. The trial court rejected that defense.

Mr. **Murphy**. If that is sustained on appeal—and I might advise you that we have 60 co-sponsors on one of the bills that have been introduced—I have been advised this week that another group of Congressmen intends to introduce another asbestos bill—we could very well have 100 Members of Congress concerned enough about this to introduce a bill.

Now, when a couple of hundred Members of Congress became concerned about agent orange, we removed the discretionary action defense and the Government became liable.

If it becomes such a serious problem as you estimate that it will, and the Members of Congress become concerned enough, and they remove the defense, the gates are open, and the Government is going to bear a tremendous amount of tort responsibility.

You have indicated that you have a plan, or you have some thoughts, about what can be done to alleviate the problem. You are afraid of the conflicting forces. I submit to you, the Justice Department is one of the conflicting forces. But we would like to hear your plan.

This committee will not close its eyes to any suitable litigation that may resolve what you recognize is a problem, and what we see as an existing problem, and we agree with you, the problem is going to be magnified.

Now, if you have a plan, you bring it up here; don't hold it down there and say later we told you so, these forces would take over. You are a force. We would like to hear your plan.

Mr. WILLMORE. I want to answer that, but let me just refer back to your statement about the discretionary function defense. I do not believe that the defense was ever waived in the agent orange case.

I have stated on a number of occasions that the discretionary function defense is essential to the Government's ability to engage in health and safety regulations, and that if that defense is lost, then a lot of health and safety regulation will eventually be lost, because the Government will not be able to afford to engage in such regulation.

The Supreme Court last year faced this very issue in the *Varig Airlines* case and unanimously upheld the Government's position on the discretionary function defense. That was not, in our opinion, a limited, narrow, technical decision by the Supreme Court.

The Supreme Court understood that if it decided the case any other way, a lot of what we do now to protect the American people, and American workers, could not be done. The Government simply could not afford to engage in such activity without the discretionary function defense, because the Government would be liable every time it tries to prevent a public disaster such as the asbestos situation and fails. Everyone would be suing the Government, and, in effect, the Government would simply get out of the business.

Now, as to the plan, there is no plan, as such. But what I have tried to say is that we recognize that this is a very serious problem. I think that a number of people in the administration believe strongly that the eventual resolution of this problem is going to require two things. It is going to require basic reforms to the tort system, either generally to all of tort law, because a lot of the problems we refer to are generic problems not limited to asbestos, or maybe if asbestos is the vehicle, only for asbestos cases. I also think that eventually it may require trying to get a lot of these cases back into the workers' compensation system. The bill you introduced tries to do that to some extent—to get the cases back into Workers' Compensation.

Part of what has happened in asbestos is, of course, that we are dealing with the worst industrial accident of all time. But part of what has also happened is that we are dealing with the failure of workers' compensation—in past years at least—to provide adequate resources for a lot of occupational diseases. To some extent, that is being rectified now in the States.

I think a number of States now believe that their workers' compensation systems are adequate for occupational disease. Hopefully, we will be able to see to it that some of these claims, if not the vast majority of these claims, go back into workers' compensation. But that can only be done if workers' compensation provides adequate and fair compensation.

I think that that eventually will be where Congress will have to go. But, as I indicated, that is going to be very hard. That will involve a tough political fight that will not be popular. It is not going to be popular with any of the interest groups involved, particularly with the tort lawyers, who will see their tort fees jeopardized if that is the route that is taken.

I would not say that that is a plan. We don't have a plan. But I would say it is our belief that eventually reform of the tort system and trying to get these claims back into the workers' compensation system is what is going to be necessary if we are going to deal with this crisis.

Mr. **Murphy**. OK. Thank you.

Mr. Petri, our ranking member, had to attend another hearing, so we will allow his counsel to ask the questions that Mr. Petri left him.

Mr. **Wood**. Thank you, Mr. Chairman.

Mr. Willmore, I just wanted to return for a moment to your discussion of sovereign immunity and the discretionary function defense. It seems to me that the statutory expression of the continued existence of the discretionary function defense is found in the way the Government regulates health and safety today, not only through OSHA but EPA and CPSC, where it regulates but imposes liability for assuring the conformance to those regulations on employers and third parties. Am I understanding the relationship correctly?

Mr. **Willmore**. I think that is part of it, but the Government also puts a lot of responsibility on itself. There are OSHA inspectors, Public Health Service inspectors; Congress enacts statutes that give agencies the duty to go out and protect the public health and safety. EPA is supposed to go out and clean up hazardous waste sites.

Mr. **Wood**. But the legal responsibility remains with the employers.

Mr. **Willmore**. Absolutely.

Mr. **Wood**. An OSHA inspector can go out to see that the regulations are abided by.

Mr. **Willmore**. Absolutely.

Mr. **Wood**. But it finds an employer responsible if it isn't.

Mr. **Willmore**. That's correct.

Mr. **Wood**. That being so, it seems to me that what the asbestos manufacturers are asking essentially is for a writing out of the discretionary function defense.

Mr. **Willmore**. That is correct. That is essentially what they want. They want the Government's discretionary function defense to, in effect, be vitiated. That is part of their position.

Mr. **Wood**. What precedent then would you think that sets for the continued Government regulation of health and safety?

Mr. **Willmore**. I think, if that occurred, every time Congress enacts a statute to protect the health and safety of the American people and American workers, they would have to look over their shoulders, and would have to ask what the budget implications are of doing this?

The way to avoid such budget implications is to do nothing. If there were no Walsh-Healey Act, if there were no obligations on the Government to go out and inspect, none of these theories—these theories based on what you have just discussed—would be applicable. These theories only exist because the Government undertook a responsibility to do what it could, given limited resources, to protect health and safety.

If we waive the situation here——

Mr. **Wood**. Does that constitute a broad societal compromise that the Government might have with its citizenry? Is that another way to look at it?

Mr. **Willmore**. I think that is one way to look at it, as a broad societal compromise. I would say it is actually an essential part of Government engaging in this kind of activity, because the Government is not perfect in any situation.

Whether it is inspecting factories for asbestos exposure, or cleaning hazardous waste sites, or certifying the safety of planes, you will always be able to second-guess the Government, particularly after the fact. If the Government, by doing these things, exposes itself to extraordinary liability, then the Government has one of two choices: Either to be part of a tort system where massive amounts of money are transferred from taxpayers to people who are injured and then blame the Government, or, as I think would occur—particularly in our present fiscal situation—the Government is simply get out of the business. Going to say, "We can't afford it."

Mr. **Wood**. The asbestos manufacturers have noted what they see a trend in the law today favoring eventual Government liability, and they cite the Supreme Court's decision in the Lockheed case that was handed down a few years ago.

I'm wondering if you would be willing to expand on that and whether you agree with that.

Mr. **Willmore**. Lockheed really had nothing to do with asbestos, of course. Lockheed is a rather technical decision dealing with third party indemnification and the ability of manufacturers to turn around and sue the Government for what they pay the tort plaintiffs who sue them. Essentially, it was a very technical issue of whether or not that was permissible under FECA, and the Supreme Court held that it was permissible.

I think Lockheed clearly enables them to sue the Government where they might not have had the opportunity before on a technical, procedural ground. But it does not go to the merits of their claims at all, either to the legal merits or the factual merits.

Mr. **Wood**. Just one other question. Another point that asbestos manufacturers make in favor of a compensation scheme involving the Government is that the alternative to the Government's participation is the eventual decline of their industries, with the eventual loss of thousands of jobs.

Is there an appropriate congressional response, assuming that that's going to happen? Is there an appropriate congressional response, aside from utilization of existing bankruptcy procedures in chapter 11 and chapter 7?

Mr. **Willmore**. Well, aside from bankruptcy, I am not sure that there is. The fact of the matter is that companies go bankrupt, and some companies go bankrupt because they are exposed to large tort liability. It is not just the asbestos industry, and I think in the future we are going to see more of this.

We are seeing lots of mass tort actions, and asbestos is maybe just the precursor of what is going to happen in the long term. We may be seeing a lot of asbestos type of situations in the decades to come.

I believe Congress has a choice. Is it going to let the liability lie with the people who are responsible for the liability; who, to the extent that they may profit from engaging in this activity, are going to have to pay the liability for engaging in this activity? Or, when this occurs, is Congress is going to come in and, with taxpayers' money, bail them out?

To the extent that Congress is considering a bail-out in this kind of a situation, Congress should be aware that this is not like the Chrysler situation, where we put in a few million dollars for a period of time, and then the company comes back reinvigorated and productive.

We are talking about a massive, ongoing transfusion of money to this industry for decades and decades to come, and that is just what will be needed to keep the industry going at a minimal level. I do not think the Government should do that.

Mr. WOOD. Should taxpayers—well, you just answered my question. I was going to ask you whether taxpayers have the moral responsibility to effectively fund asbestos companies.

Mr. WILLMORE. No.

Mr. WOOD. The continued existence of asbestos companies.

Mr. WILLMORE. No. I see no basis for saying that the taxpayer has a moral responsibility to fund the continuing viability of asbestos companies. They made money off of asbestos. They did it for profit. They knew what they were doing when they did it. They knew they were exposing workers to a dangerous substance. They were very well aware.

Back in the 1930's, they were aware that they were going to have to pay tort liability and workers' compensation, and they were scared of that, which is one of the reasons they covered up a lot of the evidence. Now they are finally, unfortunately for them, paying for the acts in the 1930's and the 1940's that they were consciously engaged in.

There is certainly no moral responsibility for the taxpayer to pay that bill.

Mr. WOOD. Thank you, Mr. Chairman.

Mr. MURPHY. Thank you, Mr. Wood.

I generally agree with you there, but I still see a specter. What happens in the Shuman case if the Government is held liable. It would seem to me that if they are eventually successful, our responsibility is going to be vastly expanded.

In most of the shipbuilding construction in World War II, my understanding is that the Government literally took over management of the shipyards. It had a greater degree of participation than merely as an inspector, in the Shuman case, the Navy inspectors were constantly there. The entire process was a U.S. Government operation, even though it was in private facilities.

If we are held liable, do you have any estimate at Justice what it will cost us in tort liability?

Mr. WILLMORE. That is a very hard question to answer. We have added together all the claims that have been made against the United States to date for indemnification and contribution, and just adding the claims together, we get about $6 billion. That is just today, and we are still in what is probably a very early stage. As I indicated in my statement, some people believe that we are really looking at about $30 billion or $40 billion or more in industry liability. Quite frankly, the industry, if it can, will try to get complete indemnification and contribution from the Government.

We do not think anything like that will occur. We do not think there will be a massive transfer of liability from industry to the Government.

Mr. MURPHY. I don't think so either. I think that there is a likelihood of a shared—and of course once you get into tort litigation, you often wind up where it is a 50-50 deal—assessment of percentage of damages.

But I just wonder, when you state that the Government could possibly face $6 billion and the industry face $40 billion, if it wouldn't be a lot better to throw our billions together and come up with a sensible solution of compensating the real victims.

Mr. WILLMORE. The Government, as I indicated, has not been held liable yet. It lost Shuman at the trial court. The decision is on appeal, and we should wait until that appeal is decided. It will probably be decided relatively soon.

Mr. MURPHY. Let's set aside then the billions and just talk about a little bit of money—millions—and think of the millions that we are spending in resources, in attorneys, in court costs, in possible settlement fees which you, as a bright counselor decides, hey, it's cheaper to pay this one off and go to the next one. Let's just talk about a little bit of money and save millions.

Wouldn't it at that point be then advisable to throw your settlement dollars into a pot?

Mr. WILLMORE. As of now, there are no settlement dollars to throw into a pot. But there are two things I would like to point out. First, the expenses to the Government just are not that significant.

The industry, for a long time, has argued that the Government is spending a great deal of money on asbestos litigation, and that the Government should take this money and throw it into a settlement pot. But this money is just not comparable to the kind of settlement money the industry is talking about. We are talking about billions and billions if we talk about a Federal contribution. But we are talking about only $10-15 million a year when we talk about the Government's litigation expenses.

Second, I want to return to a point that I emphasized in my statement. The Government already is spending an immense amount of money on asbestos. The manufacturers like to talk about the moral responsibility of the Government. They don't like to talk about the fact that the Government already is spending at least hundreds of millions, maybe billions, a year, compensating people who have asbestos injuries. None of this money is going to come back to the Treasury, whether we create an asbestos compensation fund or not. This money is being spent out of welfare, health and income maintenance type of programs, and this is money which is going to continue to be spent. So the Government is already spending an extraordinary amount of money, which it will continue to spend, no matter what happens.

Nobody gives any credit to the United States for doing that, and the United States certainly is doing that. The taxpayer is footing that bill because the manufacturers did things in the 1930's and

1940's that they knew were wrong. The taxpayer is not going to get any of that back. The taxpayer is paying that money nevertheless.

The fault for that expenditure, arguably, lies with the manufacturers. But the Government is not being reimbursed for that, and I do not know of any legislation that would do so.

Mr. **Murphy**. Maybe we ought to think about that and have an offset of benefits. Why should he be getting Social Security disability if he establishes compensation under asbestosis?

Mr. **Willmore**. Part of the problem in doing that is that, as I indicated, a lot of people who are getting benefits—Social Security disability may be an easy case in this regard—From programs such as Medicare/Medicaid, veterans' compensation, and other welfare programs may have a very serious disease such as lung cancer, but may not know whether their lung cancer was caused by asbestos.

We know that a given percentage of lung cancers were caused by asbestos——

Mr. **Murphy**. We know if he comes in under a separate compensation proceeding and attempts to prove, and does prove, that he has an asbestos-related lung cancer, then it offsets the benefits that he receives.

Mr. **Willmore**. That's part of the problem. How do you prove you have an asbestos-related lung cancer? It is very difficult.

Mr. **Murphy**. If he doesn't, then he doesn't get the compensation. You are arguing against yourself.

Mr. **Willmore**. No, sir. He could get Social Security disability, for example.

Mr. **Murphy**. You are saying how do I offset on Social Security disability? If a guy comes in and proves he had an asbestos-related lung cancer, he goes off Social Security disability and goes on to compensation. He proved it himself. He removed himself from one and put himself on the other. But if he doesn't go the Social Security disability route—what I'm saying is that an orderly process would seem to me that, if he has asbestosis and we have a separate fund to pay asbestos victims, then we remove them from the other rolls that you are speaking about which the Government is bearing 100 percent of the costs of, or through its taxation process. Yet you would be sharing responsibility with the asbestos industry and insurance industry.

Mr. **Willmore**. For asbestosis that may be a relatively simple thing to do when you are talking about something like Social Security disability. But for lung cancer it is not. You get Social Security disability if you can show you are totally disabled; you do not have to show whether you have an asbestos-related lung cancer. A lot of people may not be able to show that they have an asbestos-related cancer, or they may not want to go through the process, or they may not have the evidence. The Government continues to fund their benefits. There would be no way of offsetting that.

There are other forms of cancer where we have the same problems.

Mr. **Murphy**. You get it from cigarettes, I understand.

Mr. **Willmore**. The trouble is that there is an incredible synergistic relationship between asbestos and cigarettes where, if you are exposed to asbestos and smoke cigarettes, your chance of getting lung cancer is incredibly increased over the situation if you were only exposed to asbestos or only smoked cigarettes.

That is another question. How do you deal with this multiplicative effect? Who bears the responsibility when two different substances combine and, in the combination of those substances, create a much more serious health problem than the individual substances themselves?

Mr. **Murphy**. We will work in an amendment to include the tobacco industry.

Mr. **Willmore**. Well, that would certainly add another powerful interest group.

Mr. **Murphy**. All right. Thank you, Counselor.

Mr. **Willmore**. Thank you.

Mr. **Murphy**. We may have some written questions, and we will be sending you a letter to remind you of the materials that you were going to submit to us later. Thank you very much for being with us.

Mr. **Willmore**. Thank you.

[The questions and answers referred to above follow. Additional information retained in subcommittee files due to the volume of material.]

COMMITTEE ON EDUCATION AND LABOR,
SUBCOMMITTEE ON LABOR STANDARDS,
Washington, DC, August 8, 1985.

Mr. ROBERT WILLMORE,
Deputy Assistant Attorney General, Civil Division, U.S. Department of Justice, Washington, DC.

DEAR MR. WILLMORE: On behalf of the Subcommittee on Labor Standards, I appreciate your testifying before the Subcommittee.

In regard to your testimony and answers to questons from Subcommittee Members, enclosed please find a series of questions regarding your appearance. Your prompt attention to these matters is appreciated.

Very truly yours,

AUSTIN J. MURPHY, *Chairman.*

Enclosure.

QUESTIONS FOR ROBERT WILLMORE, DEPUTY ASSISTANT ATTORNEY GENERAL FROM THE SUBCOMMITTEE ON LABOR STANDARDS

The Torts branch of the Department of Justice has provided the General Accounting Office with data on asbestos-related claims and cases against the United States for fiscal years 1982 through 1984. Cases and claims are also projected through fiscal year 1987. The Subcommittee needs clarification of this data in order to properly utilize them during the consideration of legislation.

1. Does a "claim" equate to a "claimant"?
2. The number of claims per case varies as follows:

Fiscal year	*Claims per case*
1982	18.6
1984	32.3
1987	13.2

What factors account for such a variation within a short time span?

3. What was the basis for projecting cases and claims through 1987?
4. The dollar value per claim drops from $127,577 in FY 1983 to $64,243 in FY 1984. What accounts for such a sharp drop?
5. How much of the estimated dollar value of claims is based on actual compensation sought from the United States by claimants? How much is for cases where the United States has been impleaded or sued directly by asbestos manufacturers?

In the 1978 settlement with asbestos workers from Tyler, Texas the United States paid $5.75 million as its portion of the $20 million settlement.

6. Please provide the Subcommittee with all documents submitted by the Department of Justice to Congress, the General Accounting Office, any other government agency, as well as any internal Department of Justice documents providing the explanation or justification for the Tyler settlement.

7. In accord with Mr. Willmore's commitment during the June 25, 1985 hearing, please review and comment upon the March 11, 1941 memorandum from Commander Stephenson to Admiral McIntire. Specifically, please address whether this memorandum confirms that the Navy was aware by 1941 that "asbestos" was a problem in government shipyards and the Navy was "not protecting" shipyard workers as they "should" from asbestos dust hazards in a number of shipyards.

In response to questions asked by Representative Bartlett and other Subcommittee Members during the hearing, Mr. Willmore indicated that:

(a) The United States is spending very little on asbestos cases, around $10 million per year;

(b) The Federal Government is spending between $10 million and $50 million per year on asbestos cases; and

(c) The United States is spending "hundreds of millions" per year because of asbestos disease.

8. Please explain these estimates fully, including the methodology of arrival at each one.

9. Please indicate whether the figures include the projected costs of the computerized asbestos cases litigation support system announced in the Department's recent Request for Proposals. Please state the incurred and anticipated costs for this system.

10. Please provide complete information over the last three fiscal years and estimates for the next three fiscal years regarding the full annual expenditures for the Federal Government regarding asbestos litigation. Include expenditures by the Department's Washington, D.C. Office, United States Attorney's Offices nationwide and all other Federal agencies.

11. Please state separately the costs incurred by Federal public assistance programs as a result of asbestos disease cases. Explain the methodology used in arriving at this estimate.

Mr. Willmore testified that the United States stockpiled asbestos during World War II simply as a service to private industry.

12. Did the United States declare asbestos a critical material essential to the national defense during World War II?

13. Did not the United States establish its own corporation, the Metal Reserves Company, to purchase and import asbestos and other critical war materials?

14. In response to questions by Representative Bartlett, please indicate the tonnage amounts of asbestos fiber purchased or sold annually by the Federal Government or its agents for each of the years between 1940 and 1985.

15. Who had final responsibility for purchase decisions for Navy vessels, the government or the asbestos products industry?

16. Did the Navy or any other government agency maintain or operate government testing laboratories and experts who analyzed the performance characteristics of asbestos and other materials for fireproofing and insulation? Please provide the Subcommittee with any and all documents relating to such testing and analyses.

17. The Department of Justice has denied all administrative claims filed under the Federal Tort Claims Act. Is it the Department's policy to continue this procedure?

U.S. Department of Justice,
Civil Division,
Washington, DC, October 22, 1985.

Hon. Austin J. Murphy,
Chairman, Subcommittee on Labor Standards, U.S. House of Representatives, Washington, DC.

Dear Chairman Murphy: Enclosed are the answers to the written follow-up questions regarding my testimony before the House Labor Standards Subcommittee.

Sincerely,

Robert L. Willmore,
Deputy Assistant Attorney General.

Enclosure.

QUESTIONS 1 - 5

The Torts Branch of the Department of Justice has provided the General Accounting Office with data on asbestos-related claims and cases against the United States for fiscal years 1982 through 1984. Cases and claims are also projected through fiscal year 1987. The Subcommittee needs clarification of this data in order to properly utilize them during the consideration of legislation.

1. Does a "claim" equate to a "claimant"?

2. The number of claims per case varies as follows:

FY	Claims Per Case
1982	18.6
1984	32.3
1987	13.2

What factors account for such a variation within a short time span?

3. What was the basis for projecting cases and claims through 1987?

4. The dollar value per claim drops from $127,577 in FY 1983 to $64,243 in FY 1984. What accounts for such a sharp drop?

5. How much of the estimated dollar value of claims is based on actual compensation sought from the United States by claimants? How much is for cases where the United States has been impleaded or sued directly by asbestos manufacturers?

ANSWERS

1. As used in the data provided to the General Accounting Office by the Civil Division, the words "claim" and "claimant" ordinarily have the same meaning. With regard to the "omnibus" suits filed by the asbestos manufacturers in the United States Claims Court and the United States District Court for the District of Columbia, the number of "claims" may exceed the number of underlying "claimants" (asbestos victims). This is due to the fact that several manufacturers seek to recover payments made to the same asbestos victims. The exact extent of this overlap cannot be determined at this time.

2. The average number of claims per case pending at the end of FY 1982 and FY 1984 are different primarily because of filings

during FY 1983 and FY 1984 of new suits by asbestos manufacturers which involved unusually large number of claims.

At the end of FY 1982, only five such major cases (involving a total of 21,001 claims) were pending. The remaining 1,212 cases pending at that time involved a total of 1,663 claims. The overall average was 18.6 per case.

At the end of FY 1984, seventeen such major cases (involving a total of 85,822 claims) were pending. The remaining 2,727 cases pending at that time involved a total of 2,904 claims. The overall average was 32.3 claims per case.

The number of claims per case projected for FY 1987 is lower than either the FY 1982 or FY 1984 figure because we do not expect that new suits of the magnitude of the already filed asbestos manufacturer suits will be filed between now and the end of FY 1987. The methodology used to estimate the number of claims and cases we expect to be pending at the end of FY 1987 is explained in answer to Question #3.

3. Determining the number of cases which will be filed, when they will be filed, and the number of claims which future cases will involve are extremely difficult calculations for any area of litigation. They are particularly difficult with respect to the asbestos litigation. Due to the third-party nature of the Federal Government's involvement in much of the litigation, we have little independent means to assess potential filings and their timing, but have estimated as best we can, taking the following into consideration.

Our assessment initially attempts to determine the asbestos related claims that might be anticipated. Estimates by various epidemiologists run from a low of 76,620, as proposed in the bankruptcy proceedings of the Manville Corporation (this number was subsequently increased to 150,000) to as many as 200,000, as predicted by Dr. Irving J. Selikoff of the Mt. Sinai School of Medicine, a leading expert on asbestos-related illness. Some predict the number to be even higher. A conservative range of ultimate litigating claimants was thus determined to be 100,000 to 200,000.

An effort was then made to correlate this estimate and the history of filings against the Federal Government with information from the Federal courts as to the numbers of claims and the timing of the filing of new claims. The most comprehensive data available from the courts were contained in an appendix to an opinion issued by the U.S. Court of Appeals for the Fifth Circuit in January, 1985. The Fifth Circuit noted that:

> In August of 1982, approximately 21,000 claimants had filed product liability suits alleging asbestos-related injuries. Seven months later by March of 1983, the figure had risen to about 24,000 claimants. Currently, new suits are being docketed at an average rate of 500 per month. Jackson v. Johns-Manville Sales Corp., No. 82-4288 (January 21, 1985).

The Fifth Circuit's conclusions regarding pending claims and new filings closely mirror the experience of the Civil Division over the past several years. On October 1, 1982, the number of claims pending in suits against the Federal Government was 22,664 -- a number almost identical to that cited by the Fifth Circuit. During FY 1983 the number of new claims filed in suits against the Federal Government averaged 594 -- again a number close to that cited by the Fifth Circuit. With the filing of a number of cases during FY 1984 by the manufacturers involving large numbers of cases, the number of new claims filed per month during FY 1984 and thus far in FY 1985 has averaged about 2,800.

The Fifth Circuit also stated that "Experts do not anticipate that the death rate for asbestos related diseases will begin to level off until after 1990." Based on this conclusion, we have projected that at least through the end of FY 1987, the rate of growth in pending claims would continue at about the average rate of monthly growth we have experienced since October, 1982. We have surmised, however, that because the claims involved in the major asbestos manufacturers cases already filed against the Government represented an accumulation of claims filed against them over several years, the average number of claims in new cases expected to be filed in the future would begin to decline and reduce the average in pending cases significantly by the end of FY 1987.

4. An update of the information provided to the General Accounting Office indicates that the total amount at issue in cases pending at the end of FY 1982 and FY 1983 should have been reported as $1.1 billion and $2 billion, respectively. Thus the dollar value per claim in FY 1983 was $65,767. The dollar value of claims stated for FY 1984 and all other historical data provided were also reviewed and found to be accurate.

The variation in average amount of claims pending at the end of FY 1983 and FY 1984, although not significant, was caused by the filing dates of cases by the major asbestos manufacturers.

The caseload at the end of FY 1983 included nine such major suits involving 27,761 claims of $843 million (an average of about $30,400 per claim). The remaining suits pending at that time involved 2,025 claims of approximately $1.2 billion (an average of $592,000). This produced an overall average per claim of $65,767 at the end of FY 1983.

The caseload at the end of FY 1984 included seventeen such major suits involving 85,822 claims of slightly over 4 billion (an average of $46,655 per claim). The remaining of suits pending at that time involved 2,904 claims of almost $1.6 billion (an average of $539,109 per claim). This produced an overall average per claim of $64,243 at the end of FY 1984.

5. Of the approximately $6 billion in claims that have been filed against the United States in the asbestos litigation, only $86,541,000 (1.4%) involve claims by individuals seeking damages directly from the United States. The remainder (98.6%) involve claims by asbestos manufacturer seeking indemnification or contribution from the United States.

QUESTION 6

In the 1978 settlement with asbestos workers from Tyler, Texas the United States paid $5.75 million as its portion of the $20 million settlement.

6. Please provide the Subcommittee with all documents submitted by the Department of Justice to Congress, the General Accounting Office, and any other government agency, as well as any internal Department of Justice documents providing explanation or justification for the Tyler settlement.

ANSWER

6. Attached is the "Stipulation for Compromise Settlement" (Attachment 1) which we believe was submitted by the Department of Justice to the General Accounting Office in connection with the Tyler I settlement. We are unaware of any other documents which may have been submitted by the Department to the Congress, the GAO or any other government agency providing an explanation or justification of the settlement.

As for the request for internal Department documents, we have carefully considered the request, and have concluded that the release of these documents would prejudice the position of the United States in on-going litigation involving billions of dollars of claims. Accordingly, we cannot release these documents. Mr. Willmore will be pleased to meet with any of the members of the Subcommittee, or with any of the Subcommittee's staff, to discuss the Department's concerns regarding release of these documents.

QUESTION 7

In accord with Mr. Willmore's commitment during the June 25, 1985 hearing, please review and comment upon the March 11, 1941 memorandum from Commander Stephenson to Admiral McIntire, specifically, please address whether this memorandum confirms that the Navy was aware by 1941 that "asbestos" was a problem in government shipyards and the Navy was "not protecting" shipyard workers as they "should" from asbestos dust hazards in a number of shipyards.

ANSWER

7. The March 11, 1941 memorandum from Commander Stephenson to Admiral McIntire does not "confirm [ ] that the Navy was aware in 1941 that 'asbestos' was a problem in government shipyards and the Navy was 'not protecting' shipyard workers as they 'should' from asbestos dust hazard in a number of shipyards." To understand the import of the memorandum, it is necessary to place the memorandum in its full context. The following is a chronological description of how the memorandum came to be written, and the concerns its author was addressing.

By Executive Order 8071 dated March 21, 1939, President Franklin D. Roosevelt established the Federal Interdepartmental Safety Council ("FISC") as an official advisory agency on matters relating to Safety of Federal Employees. The FISC was to act as a clearing house for safety and health information. (This council later became OSHA.) The Chairman of FISC was the Secretary of Labor. The Division of Labor Standards of DOL was requested to cooperate with the FISC in performing its functions. On request, the FISC was to conduct surveys or investigations and report the results to the head of the department or agency concerned, together with recommendations.

Upon the death of the Chairman of the Occupational Health Hazards Committee of the FISC in June of 1939, Commander C. S. Stephenson (MC) USN (BUMED) was appointed to serve as Chairman.

In 1941, Ross McIntire, as Chief of BUMED, published the Annual Report of the Surgeon General, U.S. Navy to the Secretary of the Navy concerning statistics of diseases and injuries in the U.S. Navy for the year 1939. See Attachment 2. The report contains a section entitled "Hazard of Asbestosis," which refers to medical surveys taken at the New York Navy Yard. After such a survey of the employees of the pipecovering and insulating shops with exposures of up to 17 years, the report indicates that no cases of asbestosis were found. Id. at 24.

On February 24, 1941, the Secretary of Navy wrote to Commandants and Commanding Officers, Shore Establishments, concerning expansion of Safety & Industrial Health Program in Naval Industrial Shore Establishments. See Attachment 3. The letter described the expansion of the Navy's industrial health organization ashore,

> [t]o continue the excellent work of the past, and to cope with the new problems constantly arising incident to technological advances, and the increased hazards due to the increasing number of civil employees incident to the [then-] existing emergency[.]

The expanded program involved the establishment of an industrial health office in each naval district, headed by a medical officer for Industrial Hygiene and Medicine with assistance from a medical officer for Industrial Hygiene, Technical. BUMED was to assign these specially trained officers to these billets as soon as they became available from the special training courses which were then being conducted for that purpose. (A newspaper account of the program was provided in the March 2, 1941 edition of the Washington Star. See Attachment 4.)

Secretary Forrestal assigned Commander Charles S. Stephenson, USN of BUMED, as the designated liaison officer with the Shore Establishments Division in Safety Engineering and Industrial Health matters as additional duty. Commander Ralph H. Roberts, USN, who was in charge of the Engineering Section of the Shore Establishments Division, and Stephenson were designated as Liaison Officers of the Navy for consultation purposes with the U.S. Public Health Service.

On the same day, February 24, 1941, a conference was held in the office of Commander Stephenson, with Commander Roberts, Medical Director J.G. Townsend, USPHS, and Sanitary Engineer J.J. Bloomfield present. According to Stephenson's memorandum dated March 2, 1941 (Attachment 5), the PHS scientist matter, referred to in the March 11th McIntire memorandum arose as follows:

> ...Mr.Bloomfield stated that the Industrial Hygiene Division of the U.S. Public Health Service had organized traveling teams of trained personnel who could go into our Navy Yards and plants for the purpose of making investigations with relation to industrial hazards to the health of the personnel. Mr. Bloomfield further stated that several of the states in which Navy yards are located have divisions of industrial hygiene, and that, if desired, the U.S. Public Health Service would work through those organizations.

> ...Commander Stephenson stated that there was a great deal of confidential and secret work going on in the Navy Yards and that it was not desirable that investigators be used who were not well known to the management of the Yards and to the responsible officials in the Navy Department. Commander Roberts confirmed this statement and elaborated on the need for security.
>
> ...Commander Stephenson further stated that if these investigations were undertaken with outside ----- there was a possibility that certain labor groups might become suspicious and would voice their apprehension over conditions existing or alleged to exist, that there might be a considerable amount of discussion with labor groups over alleged hazards, even though it could be shown that the alleged hazards were not dangerous to the health of the individuals.
>
> ...Commander Roberts and Commander Stephenson gained the impression that the representatives of the U.S. Public Health Service appreciated the difficulties and confidential nature of a great deal of the work in progress in the Navy.
>
> ...They further gained the impression that the U.S. Public Health Service officials appreciate that it would be ------ to invite people in, who are not familiar with Naval organization and procedure.

(Dashes represent unreadable portions of the original document; emphasis supplied. Attachment 5 is a re-typed copy of the document, which the government obtained from the Manville Corporation. The Manville Corporation did not provide the government with a copy of the original document.)

The Stephenson memorandum to Admiral McIntire, Chief, BUMED, dated March 11, 1941, cited in Question #7, was captioned "Notes for consideration when you call on Assistant Secretary Bard." This memorandum refers to the controversy which arose when the Federal Administrator invited the PHS scientists to make surveys and make recommendations for the correction of hazards as were discovered in the yards. As previously indicated, Stephenson had told Bard that this was not considered the best policy due to the fact that they had medical officers in the yards and their recommendations were sound. McIntire had apparently discussed this with President Roosevelt who felt that PHS scientists might cause unnecessary disturbances in the labor element over alleged hazards which the Navy perceived as under control at that time.

Accordingly, as indicated in this correspondence, the Navy simply resisted having PHS representatives in the shipyards because the Navy itself had undertaken to monitor the health and safety of its workers, as well as to protect the confidentiality of certain Navy yard work. At no time did the Navy withhold from its workers or from the public the hazards associated with asbestos.

As noted in Mr. Willmore's testimony, the Federal Government's activities in this regard should be compared to the activities of some of the members of the asbestos industry. One example, in particular, illustrates the stark difference between the government's attitude and that of the industry. Dr. Roemer, a UNARCO physician in the 1940's, discovered six cases of asbestos-related lung problems among workers. When he informed his cousin, Charles Roemer (an attorney) of these problems, Mr. Roemer contacted Johns-Manville to discuss the matter. By all accounts, Manville executives implied that UNARCO's staff were fools for informing workers of incipient disease states. Mr. Roemer asked Vandiver Brown, Manville's attorney, "Mr. Brown, do you mean to tell me that you would let them [workers with asbestos-related diseases] work until they dropped dead?" Manville's attorney replied, "Yes. We save a lot of money that way." See Attachment 6.

To the extent that the March 11, 1941, memorandum is read as suggesting that the Navy was not adequately protecting the workers from asbestos, the Subcommittee is respectfully referred to the Surgeon General's 1945 findings, which negate any such inference:

1. Repeated observations by personnel of the Yard Safety and Industrial Health Departments indicated that the exposures of civilian employees in the U.S. Navy Yards to asbestos do not form an occupational health problem as alleged.

2. Reports of chest x-rays, which have been made on employees engaged in handling, processing and applying asbestos to pipes at the Boston and Bremerton Navy Yards, do not indicate any disease of the lungs from exposure to asbestos.

Memorandum from Vice Admiral McIntire (USN), Chief of BUMED, to BUSHIPS, dated March 6, 1945 (Attachment 7); see also Attachment 2.

It is critical in reviewing the March 11, 1941, memorandum to distinguish between early information regarding the harmful effects of asbestos and later information that a risk of harm exists even as a result of relatively low doses such as those encountered in the shipyards. The United States published, as early as 1918, a report that asbestos was harmful in manufacturing plants. This 1918 report identified an "urgent need" for extensive investigation of the health aspects of asbestos manufacture. See Attachment 8. A case reported in 1942 described the deplorable conditions in manufacturing plants. Rowe v. Gatke Corp., 126 F.2d 61 (7th Cir. 1942), dismissed by stipulation, 317 U.S. 702 (1943). See Attachment 9. Diligent Navy investigations during the war indicated that there was no problem in shipyards. Only when diseases unexpectedly manifested themselves during 1964-1968 did anyone -- except the industry -- realize that safe levels for users had been set too low.

The Navy's efforts during World War II to minimize harmful exposure to asbestos in shipyards are summarized in the government's post-trial brief in Shuman v. United States, No. 78-1407-S (D. Mass., served Nov. 18, 1983), detailing, inter alia, the "Minimum Requirements for Safety and Industrial Health in Contract Shipyards." See Attachment 10, pp. 21-26. The Minimum Requirements described detailed requirements and recommendations for medical personnel, medical facilities and equipment, record-keeping, protective equipment and precautions, and preemployment and periodic physical examinations. Id .

Likewise, the court's decision in Glover v. Johns-Manville Sales Corp., 525 F.Supp. 894 (E.D. Va. 1979) provides "Findings of Fact with reference to the government's actions in confronting and dealing with asbestos linked dangers." See Attachment 11. These actions include: (i) the Armed Forces' and Public Health Service's participation in seminars; (ii) the publication of data from Long Beach Naval Shipyard concerning risks associated with shipboard pipe-covering; (iii) recommendations and implementation concerning curtailing the use of asbestos at Norfolk Naval Shipyard; (iv) examinations of insulators and close monitoring of "asbestos suspects"; (v) the increasing awareness of the magnitude of the asbestos problem in naval shipyards resulted in the Navy's circulation of a series of instructions "directing the shipyard to implement various control measures to lessen the risk associated with work around asbestos products", begining in 1965; (vi) from 1969 onward, "the Navy took steps to eliminate asbestos products altogether"; (vii) Norfolk Naval Shipyard issued a "standard procedure" for dealing with dangerous concentrations of so-called "air contaminants" in 1965, recommending the use of respirators; (viii) the Navy distributed a document entitled "Safety Precautions for Shore Activities" concerning ventilation in asbestos dust areas; (ix) the Naval Ship Systems Command issued "Safety Precautions Concerning Asbestos Dust", to emphasize the necessity of precautionary measures for employees working in asbestos dust area; (x) in September of 1970 Admiral Rickover recommended that the Navy try to eliminate its reliance upon insulation to the greatest extent practicable; (xi) in 1971, the Shipyard Commander issued new instructions concerning the control of asbestos, including a lengthy list of measures to be taken in every phase of asbestos-related work; (xii) the Chief of the Navy's Bureau of Medicine and Surgery supplemented the already formidable list of safety measures with an instruction given general circulation in 1973; (xiii) the Chief of Naval Operations followed upon on the BUMED instruction with its own safety oriented instruction in 1974, setting a new and lower ceiling for exposure to asbestos fibers. *Id.* at 908-911.

As stated by the trial court in *Glover*,

> Once it became aware of the asbestos problem, the United States composed *an admirable list of measures to* be taken to deal with the hazard *far exceeding efforts of the manufacturers*. Given the extent of the risk of harm created by asbestos fiber, the government faced a difficult task in trying to make the workplace environments safe for insulators. *In effect, the government had to deal with the health hazards created by the manufacturers' products....*
>
> *Moreover, it is worth noting that the Navy took steps to upgrade its control measures but with the minimal assistance of the manufacturers.* Though the manufacturers claimed to have been in constant touch with the Navy about the use of asbestos substitutes or bonded products, it did not contact the Shipyard officials to emphasize the need for safety measures dealing with asbestos fibers in the workplace.

Id. at 910 (emphasis supplied).

In this regard it also is worthwhile noting the court's analysis of the "relative responsibility" as between the United States and manufacturers,

> *The manufacturers* marketed a product carrying the potential of disease for those not fully apprised of the danger or of the means to deal with such danger in safety; *the manufacturers* failed to give Glover sufficient information so that he could decide whether he wanted to expose himself to product or seek ways to void such exposure; *the manufacturers* put a lethal risk of harm in Glover's work environment, then allowed Glover unwittingly to confront the risk with tragic result, on a daily basis....
>
> ...[The government's] role in the developing tragedy was secondary to the role played by the manufacturers in setting loose the asbestos hazard upon Glover's workplace. *Indeed, the government was in the position of trying to minimize the threat posed by the manufacturers' products*.

Id. at 911 (emphasis supplied).

At the hearing, the Subcommittee requested proof of Mr. Willmore's statement that the asbestos industry "was engaged in activities to prevent the disclosure of evidence or knowledge at the time about the health effects of asbestos." (Pages 25 and 26 of the draft transcript.) In response to the request, Mr. Willmore provided a copy of Johns-Manville Sales Corp. v. Janssens, No. AJ-109 (Dist. Ct. App. 1st Dist. Fla., slip op. September 26, 1984), Asb. Lit. Rep. 9086-87 (Oct. 5, 1984), rehearing denied (Mem. op.), Asb. Lit. Rep. 9382 (Dec. 6, 1984), review denied, Fla. S. Ct.(April 24, 1985) (Attachment 12). In addition, the Subcommittee is referred to, and copies are enclosed of (Attachment 13), the following six opinions which further document the industry's concealment of vital information:

Fischer v. Johns-Manville, Nos., A-2430, 2942-81T2(N.J. Super. Ct., App. Div., January 31, 1984), currently pending before the New Jersey Supreme Court.

Hansen v. Johns-Manville, 82-2276 (5th Cir.,June 11, 1984), cert. denied, 53 U.S.L.W. 3668 1985.

Moran v. Johns-Manville, 691 F. 2d 811, 814-16 (6th Cir. 1984).

Neal et al. v. Carey Canadian Mines Ltd. et al., 548 F. Supp. 357 (E.D. Pa. 1982).

Myhran v. Johns-Manville, No. C81-540T (W.D. Wash.,1982), reversed on jurisdictional grounds, Nos. 82-3660, 82-3661 (9th Cir., 1984).

In Re Massachusetts Asbestos Cases, MBL Nos. 1-2(D. Mass., 1985), Order of U.S. Magistrate DeGiacomo.

QUESTIONS 8 - 11

In response to questions asked by Representative Bartlett and other Subcommittee members during the hearing, Mr. Willmore indicated that:

(A) The United States is spending very little on asbestos cases, around $10 million per year;

(B) The Federal Government is spending between $10 million and $50 million per year on asbestos cases; and

(C) The United States is spending "hundreds of millions" per year because of asbestos disease.

8. Please explain these estimates fully, including the methodology of arrival at each one.

9. Please indicate whether the figures include projected costs of the computerized asbestos cases litigation support system announced in the Department's recent Request for Proposals. Please state the incurred and anticipated costs for this system.

10. Please provide complete information over the last three fiscal years and estimates for the next three fiscal years regarding the full annual expenditures for the Federal Government regarding asbestos litigation. Include expenditures by the Department's Washington, D.C. Office, United States Attorneys' Offices nationwide and all other Federal agencies.

11. Please state separately the costs incurred by Federal public assistance programs as a result of asbestos disease cases. Explain the methodology used in arriving at this estimate.

ANSWERS

For purposes of clarification, please note the following with regard to statements (A), (B) and (C).

As to statement (A), Mr. Willmore testified that the cost of the asbestos litigation to the Department of Justice was approximately $10 to $11 million per year. In this regard, please refer to pages 36 and 37 of the draft transcript.

As to statement (B), Mr. Willmore did not testify that the Federal Government spends between $10 and $50 million per year litigating asbestos cases. Mr. Willmore made the following statement during the hearing: "So we are pretty confident that our legal expenses for the entire government are somewhere between $10 million and $15 million." (Page 37 of the draft transcript.) On page 57 of the draft transcript, the transcript indicates that Mr. Willmore, in restating his earlier estimate, said that these litigation expenses were between "$10-50 million a year." This appears to have been a transcription error, and an appropriate correction (15 rather than 50) was made to the draft transcript supplied for the Department's review.

As to statement (C), the statement that the United States is spending hundreds of millions of dollars a year because of asbestos disease includes all the costs of asbestos disease to the Federal Government, and is not limited to the costs of litigating cases relating to asbestos disease.

Questions 8 through 11 are answered as follows: part (A) deals with the asbestos litigation expenses of the Department of Justice; part (B) deals with the asbestos litigation expenses of agencies other than the Department of Justice; and part (C) deals with the non-litigation asbestos related expenses of the Federal Government.

(A) Civil Division expenditures for asbestos litigation were derived from the Department's Central Payroll System, the Civil Division's Financial Management Information System and the Civil Division's manual records system of expert witness retentions. Actual data were derived from these systems for FY 1983 and FY 1984 and through March 16 for FY 1985. Expenditures for the remainder of FY 1985 were projected based upon the actual data through March 16.

Actual salaries to employees assigned to the asbestos litigation since the beginning of FY 1983 were determined from the Justice Department's Central Payroll System. This included attorneys, paralegals and support staff. The actual amount of the Government's contribution to employee benefits programs was similarly determined.

Each Division expenditure for travel and litigative expenses is recorded in the Division's automated Financial Management Information System (FMIS) by a unique identifier known as the DJ Number. A DJ Number is assigned to each case at the time the case is received in the Division and becomes the permanent identifier for the case. Using this system, actual amounts spent for travel and litigative expenses for the asbestos cases since the beginning of FY 1983 were determined.

The Division maintains a manual system of records which identifies each expert witness retention by DJ number and records the payments made to the witness. Actual payments for expert witnesses for the asbestos cases since the beginning of FY 1983 were determined from this system. Overhead costs are a pro-rata share of all such costs for the Civil Division as determined from the Central Payroll and FMIS systems.

The Civil Division's FY 1986 budget now pending before the Congress requests funding for all activities at the 1985 level. The Division has no plans to shift personnel and funds from other litigative areas to the asbestos litigation during FY 1986. Expenditures for FY 1986 were, therefore, estimated to be about the same as FY 1985.

No estimate of expenditures for FY 1987 can be provided because the President's FY 1987 budget has not yet been formulated.

As for the Department's automated litigation support service, the above $10 million estimate discussed in Question #8 includes the cost of the computerized asbestos case litigation support system. The cost is classified as litigative expenses. The costs of the system are:

FY 1983	FY 1984	FY 1985	FY 1986
$3,000,00	$1,703,000	$6,100,000	$6,100,000

These costs include both contractor-provided services of the type described in the recent request for proposals and Department computer time-sharing charges.

There is no significant litigation activity in the United States Attorneys' Offices regarding asbestos injury claims since this litigation is all conducted out of the Torts Branch of the Civil Division. Accordingly, these estimates apply to the entire Department of Justice. These estimates do not include, however, any of the Department's costs associated with asbestos litigation not involving personal injury claims or indemnification or contribution claims relating thereto. For example, litigation expenses involving asbestos clean-up activities under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (Superfund) are not included.

(B) We do not have precise information about what other Federal agencies spend on litigation involving asbestos injury claims. However, since virtually all such expenses are in support of the Justice Department's litigation activities, we are sufficiently acquainted with other agencies' efforts that we are certain that the total of their costs are substantially less than the Department's costs. It is unlikely, in our view, that these expenses account for more than $1 million annually.

(C) Since the agencies administering the government's various health or income maintenance programs do not identify when a recipient is eligible for benefits as a direct or indirect result of a condition resulting from asbestos exposure, it, of course, is virtually impossible to determine precisely how much the government is paying through such programs to persons (or their survivors) injured by asbestos. Nevertheless, it is possible through a "ballpark" estimate to demonstrate that the amount probably is in the hundreds of millions of dollars annually.

The Urban Institute has conducted a study (funded by the Manville Corporation) which provides a starting point for any such estimate. See J. Storey & S. Hatch, "Compensation For Victims of Asbestos-Related Diseases: Potential Cost Savings

For the Federal Government," March, 1983. (Attachment 14). The study took into account the following federally funded assistance programs: Social Security (DI and OASI), veterans' pensions, SSI, food stamps, AFDC, school lunches, medicaid and earned income tax credit. It should be noted that this represents only a partial list of potentially relevant programs and benefits. Obvious sources of benefits that were not included were federal workers' compensation, veterans' health care, medicare and unemployment payments. In addition, there are a variety of other health or income maintenance programs which may be paying substantial benefits as a result of adverse medical or economic conditions resulting from asbestos-related injuries.

Considering, for purposes of illustration, only those programs identified in the Urban Institute study, the study concludes that the Federal Government may be spending $74 to $80 million annually for an assumed 20,000 cases (the study assumes that these 20,000 cases would be divided equally between disabled workers and survivors).

Assuming this estimate to be correct, the next determination is the actual number of asbestos disabled worker and survivors who qualify as potential recipients of government health or income maintenance programs at any one point in time. As noted in the response to Question #3, Dr. Irving Selikoff estimates that there will be approximately 200,000 excess asbestos-related deaths before the end of the century. This figure, however, probably understates the number of government program beneficiaries since it does not include disabled workers who live beyond the end of the century. While there is reason to believe that this underestimate may be significant, we have no way of estimating the number of such disabled workers not included in Dr. Selikoff's 200,000 excess deaths estimate. Not all 200,000 (or their survivors) are on the benefit rolls at this time, however, since for many their disease has yet to manifest itself. Assuming that there is one survivor for every excess death, that approximately half the excess deaths or the disabilities preceding those deaths (100,000) have already occurred, and that a disabled worker (or his or her survivor) remains on the roles for approximately ten to fifteen years -- all conservative estimates in our view -- the total number of beneficiaries at any one point in time is in the area of 100,000. Using the Urban Institute estimate of $74 to $80 million per year for 20,000 beneficiaries, this amounts to an expenditure of $370 to $400 million annually.

Several factors regarding this estimate bear restatement:

- The estimate is based on conservative assumptions. Even for what it purports to measure, it may significantly underestimate actual expenditures.

- The estimate uses only excess deaths. It does not include benefits paid to disabled workers who live beyond the end of the century. Nor does the estimate take into account persons injured through non-occupational exposure to asbestos.

- The estimate does not take into account a number of major relevant health or income maintenance programs.

- The estimate is at best a "ballpark" estimate. It is not intended to measure the precise amount of benefits paid to asbestos victims and their survivors through various federal programs, but rather to illustrate that these payments in fact are substantial.

- Finally, the estimate does not include the billions of dollars that the Federal Government may have to expend to remove or contain asbestos in federal facilities. For example, the United States Navy estimates that it may cost between $1 to $2 billion to remove or contain the asbestos in the United States Fleet.

QUESTIONS 12 - 16

Mr. Willmore testified that the United States stockpiled asbestos during World War II simply as a service to private industry.

12. Did the United States declare asbestos a critical material essential to the national defense during World War II?

13. Did not the United States establish its own corporation, The Metal Reserves Company, to purchase and import asbestos and other critical war materials?

14. In response to questions by Representative Bartlett, please indicate the tonnage amounts of asbestos fiber purchased or sold annually by the Federal Government or its agents for each of the years between 1940 and 1985.

15. Who had final responsibility for purchase decisions for Navy vessels, the government or the asbestos products industry?

16. Did the Navy or any other government agency maintain or operate government testing laboratories and experts who analyzed the performance characteristics of asbestos and other materials for fireproofing and insulation? Please provide the Subcommittee with any and all documents relating to such testing and analysis.

ANSWERS

12. Pursuant to Public Law No. 76-117 (1939), asbestos was alternately declared either "critical" or "strategic" to the Nation's defense. Such designation was made after obtaining the advice of industry advisory committees established for the purpose of providing advice to the Federal Government on the purchase, sale, care and handling of such materials (including asbestos). The provision of such advice was consistent with the fact that the industry had historically advised the Federal Government regarding asbestos. For example, in December 1940, replies of three leading industry members to an inquiry of the Bureau of Mines indicated that supplies of African grades of asbestos fiber were not critical and that increased imports of such fiber by the industry were being received without difficulty.

13. The Reconstruction Finance Corporation (RFC) was created by an Act of January 22, 1932, to extend aid during the depression to agriculture, commerce, and industry by direct loans to banks, other credit agencies and, with the approval of the Interstate Commerce Commission, to railroads or receivers of railroads. Subsequent legislation authorized the RFC to perform additional functions, and, with the advent of World War II, acquire strategic and critical materials, provide financing for plant conversion and construction, and undertake many other activities involved in the war effort.

The Metal Reserves Company (MRC) was a subsidiary of the RFC. It was organized in 1940 to procure, stockpile and dispose of strategic and critical metals and minerals and the payment of subsidies to their producers, as, for example, under the wartime and post war "premium price plan." All MRC programs were undertaken at the request or under the sponsorship of other federal agencies. Policy for the programs was made by such agencies as the War Production Board and the military services. In the course of its activities, the MRC disbursed $2.75 billion, acquiring about 50 kinds of metals and minerals from 51 countries, 38 states, Alaska and the Philippines. Proceeds from the sales of the materials purchased by the MRC amounted to $2.8 billion. Another $1 billion was disbursed for freight, storage, handling, operating expenses and for subsidy payments. The largest single expenditure by the MRC was the payment of over $350 million indirect subsidies to producers of strategic metals and minerals. The MRC was dissolved and merged with the RFC on July 1, 1945. Its assets and liabilities were then liquidated by the Office of Metal Reserve established within the RFC.

14. The following is our best information on the total amount of asbestos (short tons) consumed in the United States from 1940-1984, the amount disposed by the National Stockpile, and a percentage comparison. As you will note, we have no National Stockpile disposal information for years 1947 through 1965. However, for the reason discussed in footnote 3 (e.g., that the stockpiling had been discontinued in 1945, and that the wartime stockpile had been virtually depleted by the end of 1946), we are quite confident that National Stockpile disposals during this period were negligible.

	Apparent Consumption 1/	Disposals 2/	% of Disposals to Consumption
1940	262,199	0	0%
1941	438,741	0	0%
1942	433,949	1,645	.38%
1943	445,902	32,576	7.30%
1944	389,241	1,918	.49%
1945	378,030	0	0%
SUBTOTAL	2,348,062	36,139	1.54%
1946 3/	458,727	12,141	.64%
1947	616,838	*	
1948	678,443	*	
1949	535,132	*	
1950	728,786	*	
1951	796,922	*	
1952	752,609	*	
1953	743,625	*	
1954	724,117	*	
1955	782,204	*	
1956	728,272	*	
1957	723,492	*	
1958	685,284	*	
1959	754,045	*	
1960	709,194	*	
1961	665,544	*	
1962	726,194	*	
1963	724,212	*	
1964	813,306	*	
1965	794,708	*	
1966	806,391	266	.033%
1967	720,583	931	.13%
1968	817,363	821	.10%

BEST COPY AVAILABLE

1969	784,321	3,881	.49%
1970	732,913	9,933	1.36%
1971	768,781	6,756	.88%
1972	821,728	17,711	2.15%
1973	882,908	1,651	.19%
1974	845,825	28,566	3.38%
1975	607,637	4,857	.80%
SUBTOTAL	21,930,104	87,514	.40%
1976 4/	725,762	552	.076%
1977	671,026	207	.030%
1978	681,544	0	0%
1979 5/	617,537	1**)	.0001%)
1980	395,131	0**)=140	0%)=.012%
1981	384,226	0**)	0%)
1982	271,536	0	0%
1983	239,039	0	0%
1984	248,954	0	0%
SUBTOTAL	4,234,755	899	.02%
TOTAL	28,512,921	124,552	.44%

1/ Bureau of Mines Asbestos Yearbook definition of apparent fiber consumption: Production plus imports minus exports of fiber.

2/ This information was derived from Stockpile Reports to the Congress, Munitions Board, for the war years and from Bureau of Mines Asbestos Yearbooks for the years 1945 and 1946. Disposal information for the years 1966-75 was derived from disposal summary documents provided by the General Services Administration.

3/ Stockpile balance on December 31, 1944 was 22,041 short tons. Bureau of Mines Asbestos Yearbook for 1945 indicates that stockpiling efforts were discontinued with cessation of major military operations and steps were taken to liquidate a large part of the stockpile. In early 1946, 9,900 tons were sold to the French and Belgian Missions, thus leaving an estimated balance of 12,141 short tons.

In 1946 the Bureau of Mines reported that "stocks of asbestos accumulated by the government during the war were being sold to industry and at the end of the year were nearly depleted."

4/ Information for 1976-84 was derived from Bureau of Mines Minerals Yearbooks for Asbestos.

5/ In November 1979 President Carter authorized the transfer of up to 1,000 short tons of chryostile asbestos from the Stockpile to the Department of Defense. GSA records indicate,however, that only 139 of the 1,000 short tons were transferred pursuant to that authorization. The last shipment occurred July of 1981. Although no other authorizations or releases have taken place since that time, some asbestos from the Stockpile has been buried. Figures on the amount of buried asbestos are not available at this time.

15. The Navy, of course, made preliminary decisions to purchase, i.e., procure insulation materials for the construction and repair of naval vessels. These decisions were made, however, in conjunction with the advice of and in consultation with industry representatives. Any materials ultimately purchased were done so pursuant to the appropriate procurement procedures (either formal advertising or competitive negotiations) by which industry members submitted bids or proposals.

16. The U.S. Naval Engineering Experiment Station ("EES") of Annapolis, Maryland was created through the Navy Bureau of Engineering (predecessor to the Naval Sea Systems Command). See Act of June 20, 1940, C. 400, 1(a), (b), 54 Stat. 492 (abolishing Bureau of Engineering). Attached is a 1933 memorandum issued by Assistant Secretary of the Navy Roosevelt which sets forth the policy of the Navy Department as to the testing of materials for Navy use (Attachment 15). This memorandum indicates that the testing procedures were used primarily to enable the government to purchase existing products -- i.e., manufacturers wishing to market their products to the government submitted samples (at their expense) to be tested so that specifications could be written for that product (with industry input), and the product could be purchased by the government (at a profit for the industry).

QUESTION 17

The Department of Justice has denied all administrative claims filed under the Federal Tort Claims Act. Is it the Department's policy to continue this procedure?

ANSWER

17. The Department of Justice neither denies nor approves administrative claims filed under the Federal Tort Claims Act. Administrative claims are required to be presented to the agency whose alleged negligence forms the basis for the suit. The head of such an agency has the statutory authority to compromise or settle any such claim. Although the Justice Department must approve any award in excess of $25,000, such approval has never been requested.

Few, if any, administrative claims filed under the Federal Tort Claims Act have been denied. In most cases, the appropriate federal agency has requested more information from the claimant, and this request has generally been refused. In the event that such claimant has elected to file suit, the government has moved to dismiss for failure to provide sufficient information to comply with the administrative claims procedures in the Federal Tort Claims Act.

During the hearing, there was some discussion of Mr. Paul McGrath's earlier testimony regarding the settlement of asbestos lawsuits against the government. For purposes of clarification, please note that Mr. McGrath's testimony referred to lawsuits actually filed in court.

Mr. **Murphy**. We have two gentlemen who will serve jointly on a panel, Mr. Frank V. Connolly, former director of the Special Rating Division of the War Production Board, and Mr. James Morgan, an industrial hygienist.

Will you two gentlemen take your places at the witness table? Mr. Connolly, you may proceed.

STATEMENTS OF FRANK V. CONNOLLY, FORMER DIRECTOR, SPECIAL RATING DIVISION, WAR PRODUCTION BOARD; AND JAMES MORGAN, INDUSTRIAL HYGIENIST

Mr. **Connolly**. Thank you, Mr. Chairman.

As you stated, my name is Frank V. Connolly, "Triple-A Connolly" to those who dealt with me during World War II. I was director of the Special Rating Division of the War Production Board. The Triple-A refers to the highest series of priority ratings used by my Division for War Materials and Projects. I was often called the chief umpire, the last court of appeals for all of the conflicts that were incident to industries' production efforts during the war.

The subcommittee requested that I testify today in order to give you a brief overview of the system for priorities, allocation, and materials production during World War II and to explain where asbestos fit into that system.

Let me state at the outset that, in my mind, it is difficult for someone who did not live throughout the war to truly understand the mentality of the wartime emergency. The Federal Government did not simply control one or two industries, it controlled the entire economy and had specific requirements and controls for each industry. I'm not talking about controls in the socialistic sense but in the patriotic sense. All Americans—men, women, and children—went to war on December 7, 1941.

The War Production Board was established within the Office for Emergency Management by Executive Order 9024 on January 16, 1942. Its mandate was to exercise general direction over the war procurement and production program. Specifically, the chairman of the War Production Board was ordered by the President to "determine the policies, plans, procedures, and methods of the several Federal departments, establishments, and agencies in respect to war procurement and production, including purchasing, contracting, specifications, and construction; and including conversion, requisitioning, plant expansion, and the financing thereof, and issue such directives in respect thereto as he may deem necessary or appropriate."

The first task was to provide industrial facilities for the production of materials commensurate with the needs of the Armed Forces. Accordingly, in the period immediately following the outbreak of war, there were two main objectives: first, the expansion of mining facilities and construction of new plants and tools; and two, the conversion of existing plants and tools used in the manufacture of less essential civilian goods. We tried to ensure the most efficient utilization of plants, materials, and manpower, with the conviction that our liberty and the lives of our soldiers depended upon the success of those efforts.

The major activities of the War Production Board revolved around its exercise of the power to assign priorities, to deliveries of materials, to require acceptance and performance of contracts and orders deemed necessary for the defense of the United States, and to reallocate material and facilities in short supply. Those powers were vested in President Roosevelt by title III of the Second War Powers Act and were, in turn, delegated by the President to the board.

The board exercised overall control of the War Production and Procurement Program and directed the flow of materials and components throughout the industrial system. By the end of 1942, the value of that war production was larger than the total national income of the Depression years.

The primary method of controlling the flow of materials and finished products in the war economy was the priorities system. Priority ratings or preference ratings, expressed in a continuous series from AAA to B-8, indicated the relative importance of various uses of material. They were established with the full force of law by Priorities Regulation No. 1, which said that any purchase order bearing a preference rating must be accepted and given its proper place in production and delivery schedules. It stated what producers could and could not do under the priorities system. Probably its most important provision was that all rated orders, civilian as well as war, were compulsory. They had to be accepted. Delivery dates had to be specified, and no one was permitted to ask for a delivery date that varied from his own production or delivery schedule.

At the same time, the priority system was flexible enough to allow for revision of preference for any particular projects as specific urgencies arose. Within the Special Rating Division, we used both Government officials and people with industry experience to operate a control desk which had authority to resolve day-to-day allocation problems.

A special Compliance Branch within the War Production Board with investigative and legal sections and an extensive field organization was charged with enforcement of priorities orders. By means of industrywide surveys, spot checks, and individual investigations of apparent violations, the Compliance Branch maintained a constant watch over the use of critically needed scarce materials.

Of course, criminal penalties were generally unnecessary during the war emergency. Everyone—consumers and industry—gave their unquestioning and utmost cooperation. The problem now is for people today to even understand the environment in which manufacturers were operating during the war to meet the Government's requirements and specifications.

There was no question then—and I have none now in my own mind—of who had the final word. It was always the Federal Government. Meeting the Government's requirements and specifications and fulfilling the Government's contract requirements always was the first priority.

The priority system was the basis of our entire economy, because our entire economy was devoted to the war effort. To give you a feel for that effort, allow me to quote from a release that I authored in August 1942:

> Every worker and every factory, every bit of material and every machine is now a part of the war program. No use of material is unimportant and no company has a right to think of its own operations except in connection with the war program. Priorities must be accepted on this basis, and a strict observance, not only of the letter but also of the spirit of the priorities system, is a high patriotic duty.
>
> There are no longer distinctions between soldiers and civilians when the bombs fall, and there likewise are no distinctions between soldiers and civilians in massing the forces of the Nation for total war.
>
> Material has become just as important as fighting man power, and any failure to produce material which might help to win a battle is just as serious as failure of soldiers under fire.
>
> Priorities orders are the basis for production of planes and ships, and a day's delay in carrying out orders on the home front may mean a day's delay in achieving final victory.

To give you a picture of where asbestos fit into the priorities program, I would compare it to the program for rubber, which is better remembered because it affected a wider scope of people. Rubber was one of the 29 substances listed under Public Act 117 of June 7, 1939, as "strategic and critical materials essential to the needs of industry for the manufacture of supplies for the Armed Forces and the civilian population in time of national emergency."

The act had been passed by Congress prior to the war to "encourage as far as possible the further development of strategic and critical materials within the United States for common defense."

At the outbreak of the war, in every city, town, and village, committees were formed to direct efforts to obtain articles made of rubber, from tires and garden hoses to kitchen utensils and girdles. I don't know much about the girdles. Without rubber, there would be no planes or trucks to engage the enemy.

Though less well known to the general public at that time, asbestos was also one of those 29 critical materials. The greatest consumer of asbestos during the war was the Maritime Commission and the Navy, and the asbestos allocation problem was one of immense proportions.

Between December 7, 1941, and October 1, 1945, the Nation's shipyards added over 1,300 major combat ships to the Navy's fleet and approximatley 5,777 merchant ships to our merchant marine fleet.

At the start of the war, 8 Navy yards and 24 private yards were capable of building large combat or merchant vessels. During the war, the Navy and Maritime Commission financed 99 additional shipyards with that capacity. For the most part, all 131 shipyards were operated on a 24-hours-a-day, 7-days-a-week schedule.

A special asbestos section was established within the War Production Board to address the critical needs for asbestos. Immediate estimates were made by the asbestos section of the material requirements needed to keep the asbestos industry fully operative in order to meet the Government's demand for goods. The estimates formed the basis of production programs developed by the Requirements Committee of the War Production Board.

The Requirements Committee consisted of members of the Board and representatives of those agencies, such as the Navy and Maritime Commission, that were authorized to present demands for critical materials.

On January 20, 1942, Conservation Order M–79 was issued by the Board to assume the conservation and allocation of the supply and restrict the usage of African asbestos which was the main source of asbestos used to make insulation and other products for the Navy and Maritime Commission.

Only 6 percent of the asbestos consumed in the United States was produced here, including substantial amounts used by the other branches of the Armed Forces.

Restrictions on African asbestos were tightened in June 1942, after the sinking of a ship in a convoy from southern Africa carrying 3,300 tons of asbestos fiber. In the latter part of 1942, the Board recognized that supplies of Canadian grades of asbestos were also becoming critically short. Consultations were held with Canadian producers, and an allocation method soon was developed.

Most apparent was the difficulty in obtaining sufficient quantities of asbestos textiles, including insulation materials, to meet essential military needs. Through the issuance of Conservation Order M-123 in early 1942, a rating of A-10 was required for the shipment of any asbestos textiles and packages containing asbestos textiles. In other words, the asbestos industry was forbidden to ship those products to anyone with a priority rating under A-10.

A few months later, that order was amended to include woven friction materials, such as brake linings, within the A-10 rating. Anyone shipping those materials in violation of the priority system was subject to felony prosecution.

You must remember, of course, that not only was our country's shipbuilding industry devoted to the war effort on a 24-hours-a-day, 7-days-a-week basis, but so too were the auto, trucking, and other heavy industries which provided vital landcraft for the Armed Forces.

By the end of 1942, less than a year after the outbreak of war, we recognized that the use of the priority systems for asbestos texties was not effective. The materials were too scarce for the priority system. Therefore, on February 9, 1943, the Board issued Conservation Order M-283, which places asbestos textiles under 100 percent allocation by the War Production Board, surpassing even a AAA priority rating.

I want to stop here and say that conflicts came under that order, and I was given an overriding directive to issue overriding directives where the AAA rating was not in effect.

Other asbestos-containing products, such as asbestos cement made from Canadian fibers, continued to have high priority ratings throughout the war, but asbestos textiles had to be allocated by the Board itself to assured continued supply for the shipbuilding program.

The fact that critical war materials, such as asbestos, were controlled by the Federal Government under a priority system and sometimes actually imported, owned, sold, or allocated by the Government itself should come as no surprise to this committee. But the urgency of the situation, that the enemy could soon be on our shores, is difficult to grasp today. Let there be no doubt, however, that that was the case beginning December 7, 1941, and continuing throughout the war years.

Mr. Chairman, I was there and can tell this committee without hesitation that the companies manufacturing asbestos-containing products during World War II according to Government specifications for delivery to the Armed Forces were required by statute to do so and were required to give the Government's requirements the highest priority. The War Production Board assured that this job would get done.

Thank you.

Mr. MURPHY. Thank you very much, Mr. Connolly.

Before we have questions for you, we will ask Mr. Morgan to submit his statement.

Mr. Morgan.

Mr. MORGAN. Mr. Chairman, my name is James F. Morgan.

I have submitted written testimony, and I have here a summary of that testimony which I'd like to read now.

Mr. MURPHY. Thank you. We will enter your entire testimony into the record, without objection.

Mr. MORGAN. Thank you.

I am retired after a long career in industrial hygiene work. I was invited by the subcommittee to come here today to recount my personal experiences while serving as an industrial hygienist for the Navy during World War II.

My testimony will concern my personal observations as a naval hygienist. I am being reimbursed for my expenses and time by UNR Industries, a former manufacturer of asbestos-containing materials.

In 1942, I left employment by the Food and Drug Administration as a chemist and accepted a commission in the Naval Reserve. The Navy sent me, along with 13 other naval officers, to a course of instruction in industrial hygiene at the Harvard School of Public Health. This was the last of a series of special courses in industrial hygiene that were sponsored by the Navy at Harvard and at Columbia University. These courses covered all aspects of industrial hygiene and consisted primarily of lectures, field trips, and laboratory exercises.

In the course of the field trips, we were taken to industrial establishments in New England to become acquainted with various known occupational health hazards and the measures that could be taken to control them.

The lectures were devoted to the effects of various materials upon the human body and the techniques for recognizing and evaluating exposures to these materials in industrial situations. The dust diseases constituted a sizable part of this instruction, of course, and included asbestosis and silicosis.

The Navy's purpose in sponsoring these courses was to prepare personnel for investigating and reporting occupational health programs in Navy operations such as shipbuilding, the maintenance of ships and aircraft, and the manufacture of arms and ammunition.

It was in the course of instruction at Harvard that I learned of the existence of asbestosis as a disease caused by the excessive inhalation of asbestos fibers.

We were made familiar with published results of studies in Great Britain, South Africa, and the United States during the late 1920's and the 1930's. These studies established the cause and effect relationship between asbestos exposures and the disease condition. We became aware also of the need to control dust in manufacturing operations employing asbestos-containing materials.

Upon completion of my course work, I was assigned to a joint program that the Navy and the Maritime Commission had agreed upon for protecting the health and safety of workers in wartime shipbuilding.

Dr. Philip Drinker of the Harvard School of Public Health was the chief health consultant for the Navy/Maritime Commission Program. He had spent part of 1942 studying conditions in shipyards on the east and west coasts and had determined what the major problems were in preventing occupational disease and illness.

Dr. Drinker and his colleagues recommended standards for shipyard health and safety. The Navy and the Maritime Commission accepted these recommendations and in February of 1943 jointly promulgated minimum requirements for safety and industrial health in contract shipyards.

A copy of the minimum requirements was sent to all contractors constructing ships for the Navy and the Maritime Commission accompanied by a letter signed by the Secretary of the Navy and the U.S. Maritime Commission chairman.

The letter included the following statement:

> Each contractor is hereby given notice that the Navy Department and the Maritime Commission will expect full and complete compliance with the minimum standards which bear the approval of the Navy Department and the Maritime Commission, and each is requested to give full cooperation to the consultants on health and safety who will be charged with the coordination and supervision of the safety and health programs of the two agencies.

At the beginning of 1943, my assignment was to join a half dozen other industrial hygienists, medical, and safety consultants in teams to visit the contract shipyards on the Atlantic and Pacific coasts, the Great Lakes, and the Gulf of Mexico. We were to conduct surveys to determine whether the shipyards were in compliance with the minimum requirements.

In all, I had written to approximately 100 to 150 shipyards, but I hear from Mr. Connolly that it was 131 that were surveyed over a 2-year period. The results of the surveys were published in formal reports which were then provided to the authorities responsible for taking corrective action. Many of these reports are available today.

After we conducted a survey, but while we were still at the shipyard, we would discuss our findings and recommendations with Government officials and supervisory shipyard employees.

Our discussions and reports included statements and recommendations based upon our observations of the handling of dust-producing materials, such as insulation products containing asbestos. Our surveys found that conditions varied considerably from one shipyard to another.

The minimum requirements singled out asbestosis as one of the occupational diseases requiring preventive actions. Our recommendations were based upon the minimum requirements and included measures for controlling asbestos dust.

For example, we recommended segregation of dusty work, special ventilation systems including hoods and local exhausts, use of personal protective equiment such as respirators, and period medical examinations. In addition, we also recommended the wetting down of dusty materials.

We found that some shipyards were well advanced in their utilization of these measures. However, others were handling asbestos insulating material without forethought or effort to control exposures.

Followup surveys revealed that some shipyards made improvements and others did not. For example, at least two of the shipyards I surveyed failed to implement the recommendations I had made for controlling asbestos dust under the minimum requirements. These and other survey reports are part of my written testimony.

Mr. Chairman, based on my experience as an industrial hygienist, I believe it is indisputable that the Government's knowledge of asbestosis as an occupational disease caused by overexposure to the inhalation of asbestos fibers, was firmly established more than 40 years ago.

The legislation now being considered by this subcommittee provides a formula for acknowledging the responsibility of the Federal Government for asbestosis claims arising out of shipyard exposure.

This summarizes my general knowledge of what was going on during the shipbuilding effort of World War II with respect to industrial hygiene and asbestos control. I'd be happy to answer questions by the subcommittee.

[Prepared statement of James F. Morgan follows. Supplemental Information retained in subcommittee files due to the volume of material.]

PREPARED STATEMENT OF JAMES F. MORGAN, HAVERTOWN, PA

My name is James F. Morgan and I reside at 612 Merion Avenue, Havertown, Pennsylvania. I am retired from a long career in the field of industrial hygiene and health, although I work occasionally as a consultant in the area. I want to thank you, Mr. Chairman, for the opportunity to testify this morning and I hope that the information and knowledge I provide to this subcommittee will assist you in your efforts to gain passage of this seriously needed legislation.

I received my B.S. in Chemistry from the George Washington University in 1939. I did graduate work in biochemistry at Georgetown University. In 1942, I was commissioned in the United States Naval Reserve.

Under Navy orders, I attended an industrial hygiene course at the Harvard School of Public Health in 1942 and obtained a certificate in industrial hygiene upon completion of that course. After the war, and throughout my career in the field of industrial hygiene, I attended numerous other graduate level courses and programs in the field of industrial hygiene and health.

As a Navy lieutenant from 1942 to 1946, I worked as an industrial hygienist on two principal assignments. After returning from my training course at the Harvard School of Public Health, I participated in the Joint Navy/Maritime Commission Shipyard Health Program. I also participated in the Joint Navy-Public Health Service Welders' Health Study Program. From 1946 to 1947, I worked at the Food and Drug Administration as a biochemist. In 1947, I joined the Industrial Hygiene Foundation, an organization of industrial companies banded together for research and action promoting employee health. I worked there until 1955 as chief chemical hygienist. In 1955, I became the director of the Industrial Hygiene Division of the Medical Department at the Pennsylvania Railroad Company. In 1961, I joined the DuPont Company and worked there until 1980 as a staff consultant in the industrial hygiene and health area. In 1980, I became semi-retired and worked briefly as Vice-President of an industrial hygiene consultant firm known as Industrial Health Engineering Assoicates, Inc.

Throughout my long career, I have been an active member of several organizations concerned with industrial hygiene and health. I have been a member of the American Industrial Hygiene Association since 1947, and at various times have served on different committees, on the board of directors, and as President of the Delaware Valley section of the Industrial Hygiene Association. I was a member of the American Chemical Society from 1943 to 1961, and a member of the American Conference of Government Industrial Hygienists from 1943 to 1946. In 1980, I was made an honorary lifetime member of this organization.

I have published several articles in the field of industrial hygiene and health, some alone and some as co-author with other industrial hygienists and chemists. These publications are listed on my resume. My other professional activities have included a position as lecturer at the University of Pittsburgh, Graduate School of Public Health from 1951 to 1955, and service on various committees and study groups in the field of industrial health and hygiene. These activities also are listed on my resume.

When I was sent by the Navy in 1942 to the Harvard School of Public Health for intensive training in industrial hygiene there had already been several previous industrial hygiene courses at Harvard. Similar courses had been given at Columbia University for Navy personnel. They concerned known industrial hazards such as asbestos. These courses covered all aspects of industrial hygiene. At Harvard, I was a member of a class of approximately 14 students. Among the students were medical doctors, engineers, chemists and sanitarians.

The course consisted primarily of lectures, field trips and laboratory exercises. The field trips consisted of onsite training in industrial establishments in New England. At various plants, we were shown the occurrence of various known occupational health hazards and were shown what measures could be taken to control them. Lectures were devoted heavily to the effects of various materials upon the human body. A large portion of our work consisted of a study of potentially fatal disease, including silicosis and asbestosis.The Harvard course was conducted by Dr. Phillip Drinker and Dr. Charles Williams, acknowledged experts on industrial dust, and Dr. Leslie Silverman, who conducted the laboratory. They were our primary lecturers but at times we did have special guest lecturers. In our studies, we relied upon several books and articles that contained the latest knowledge on the hazards of exposures to harmful dust. Dr. Drinker and Dr. Williams each recommended during the course several articles which had been published during the preceding decade on the subject of asbestos health hazards, including studies going back to the early 1930's in Great Britain.

The course work at Harvard was extremely intensive and required us to work long hours daily for three months. As a result, I came away from the course with a firm understanding of the principal causes of occupational diseases, the means for identifying them and evaluating their seriousness in any given location, and the ability to recommend control measures to prevent diseases, including absbestosis.

One of the principal purposes of the Navy-sponsored courses at Harvard and Columbia Universities was to prepare military personnel to investigate and report on occupational health programs and problems in the field. Upon completion of my coursework, I was assigned to the Joint Navy-Maritime Commission Shipyard Health Survey program being conducted under the supervision of Dr. Drinker, who at the time was the program's chief health consultant. Before I had been assigned to the Joint Navy-Maritime Commission Program, Dr. Drinker and others had conducted initial surveys of shipyards around the country which revealed that effective control of asbestos dust was extremely poor and that shipyards lacked proper health protection procedures. Based on these initial surveys, Dr. Drinker and his colleagues recommended comprehensive regulations pertaining to shipyard health and safety. The Navy and the Maritime Commission ultimately accepted these recommendations and in February, 1943 jointly promulgated a formal edict known as the "Minimum Requirements for Safety and Industrial Health in Contract Shipyards."

The government distributed the Minimum Requirements to every shipyard holding contracts with the Navy or the Maritime Commission, and notified each shipyard that it was expected to comply fully with the Minimum Requirements.

The Minimum Requirements set forth measures to control asbestos dust and other industrial dusts in shipyards. These requirements were aimed at alleviating the asbestos dust problems which Dr. Drinker and others had discovered in their original shipyards investigations.

One of my principal duties as a member of the survey program team was to investigate private shipyards, observe conditions relating to health protection and acquaint shipyard management with the "Minimum Requirements." The Minimum Requirements were, to my knowledge, one of the first formal efforts by the Navy to protect workers in contract shipyards from hazardous dusts such as asbestos. In contrast, some of the shipyards operated by the Navy had previously been staffed with industrial hygiene personnel to assist in identification, evaluation and control of health hazards. We knew this type of approach was necessary because a variety of asbestos-containing products were used in shipyards pursuant to government contract specifications. I understand that copies of government specifications for asbestos-containing insulation materials covering the years 1898–1945 have been made available to the Subcommittee. I suggest these materials be made a part of the record for further consideration by the Subcommittee.

The major concern of the Navy's Shipyard Survey program regarding asbestos was prevention of the well known disease of abestosis, the fibrotic condition of the lung resulting from the inhalation of asbestos fibers. When I joined the program in January, 1943, it was decided that a team of trained industrial hygienists would be sent around the country to all contract shipyards to conduct surveys to determine whether the shipyards were in compliance with the Minimum Requirements. In all, approximately 100–150 shipyards were surveyed over a two year period beginning 1943. The results of our surveys were published in formal reports which were then provided to the authorities responsible for taking corrective action. Many of these reports are available today. In addition, after we conducted a survey but while we were still at the shipyard, we would discuss our findings and recommendations with government officials and supervisory shipyard employees. We were there not just as inspectors but as individuals who had been professionally trained to recommend to the cognizant authority, ways to minimize known health risks, including those of exposure to asbestos.

Our survey revealed that conditions varied from yard to yard and that conditions in many shipyards required immediate corrective action to reduce harmful exposure to asbestos dust as mandated under the Minimum Requirements. The corrective action we would recommend would invariably be centered around the recommendation for better control of exposure to asbestos dust. For example, we would recommend segregation of dusty operations, the use of exhaust ventilation, the wetting down of materials known to contain asbestos and the clean-up of areas in which asbestos-related work had occurred. Importantly, we also recommended that respirator equipment and periodic examinations be utilized more fully.

The survey of any particular shipyard would be conducted by using a checklist of potential hygiene problems that had been identified for investigation. This checklist was based on the Minimum Requirements. In other words, we would investigate all the activities the Minimum Requirements sought to address to determine whether these regulations were being followed.

We knew that asbestos dust was a serious problem in many shipyards so we conducted thorough investigations of various locations where asbestos-containing products were being used. For example, we would visit the insulation shop, where asbestos-containing insulation products were cut and sawed into proper shapes before being installed on ships. Cutting and sawing operations created a lot of asbestos dust, and it was very important to insure that all of the protective measures mentioned in the Minimum Requirements were being followed. In addition, we would check to make sure that exhaust blowers were in operation on cutting equipment, that the workers were wearing approved respirators and the asbestos-containing insulation products were wet-down before cutting. We also went on-board several ships to determine whether the protective measures listed in the Minimum Requirements were being followed by workers who actually installed asbestos-containing products on ships.

In general, our surveys found that conditions were not good where asbestos dust was concerned. Although some shipyards were better than others in implementing asbestos dust control measures, asbestos dust was still on the whole quite a serious problem. For example, my inspection in 1944 of the pipecovering shop of the Gulf Shipbuilding Corporation in Chicasaw, Alabama revealed that asbestos dust conditions were very bad at times and that asbestos dust was allowed to accumulate on open spaces around the shop. To correct these conditons, I emphasized in my report that inhalation of asbestos dust could result in asbestosis and recommended several control procedures to abate the asbestos hazard.

I found similar conditions existing in other shipyards, such as the Seattle-Tacoma shipyard and the Willamette Iron & Steel Corporation in Portland, Oregon. My investigation of the Seattle-Tacoma Shipyard revealed that the control of asbestos dust was not working well. Accordingly I recommended that there be a regular clean-up of the Asbestos Shop, that satisfactory dust collectors be provided on asbestos saws and that water spray be used to reduce dust generated by asbestos cutting operations. The unhealthy conditions I documented at various yards during World War II also existed to a worse degree in other shipyards as documented by the reports made by my colleages at the time. Conditions at the Bath Iron Works in Maine, for example, were found to present a "very real asbestosis hazard." I have provided copies of these reports as a supplement to my testimony for further consideration by the Subcommittee.

Mr. Chairman, based on my experience as an industrial hygienist, I believe it is indisputable that the government's knowledge of asbestosis as an occupational disease caused by overexposure to the inhalation of asbestos dust was firmly established more than 40 years ago. The legislation now being considered by this Subcommittee provides a reasonable formula for acknowledging the responsibility of the federal government for asbestos claims arising out of shipyard exposure.

Mr. MURPHY. I thank both of you.

I wonder if you would care to address the position, however, of Deputy Assistant Attorney General Willmore where he said OK, maybe the Government had knowledge and the Government accepted the responsibility, as you pointed out, to inspect the shipyards and offer safety advice, but did that end the Government's participation? Was it totally the manufacturers who had the idea to use asbestos and not the Government? Did the acceptance of the Government in maintaining a flow of asbestos and inspecting the shipyards—does that make the Government culpable? Does that make the Government responsible?

Mr. Willmore took the position that, maybe we, the Government, collected all the asbestos and then doled it out, and maybe we inspected the shipyards, but neither of those two things gives the Government any responsibility.

Do you think the Government had a greater role than what Mr. Willmore portrayed?

I'll ask for an answer from both of you.

Mr. MORGAN. I'll start.

Mr. MURPHY. OK.

Mr. CONNOLLY. May I answer, or are you——

Mr. MORGAN. I was going to start out.

Mr. CONNOLLY. I give you the honor.

Mr. MORGAN. Thank you.

It's a very complicated situation to assign responsibility for the protection of health of workers. It has been said in this room this morning that the manufacturers didn't live up to their responsibility, they withheld information.

I think I've set forth facts that indicated that the Government had information, such as it existed in those decades of the 1930's and 1940's, and that was limited to asbestosis as a disease caused by asbestos.

There has been a lot of confusion because later on other health effects were established scientifically as being related to exposures to asbestos. That was not known at that time. Asbestosis was the disease that affected workers who were over-exposed to asbestos.

The Government specified the use of asbestos in shipbuilding, and the Government recognized that its contractors—and I'm speaking now not of the established Navy yards, which had their own occupational health programs, but the contract shipyards operated by private industry under Government supervision—were instructed by the Government, through this statement of minimum requirements for health and safety, that precautions had to be taken in the building of ships to protect overexposure to asbestos.

The Government had this program of periodic inspection to see whether the minimum requirements were being lived up to, and, in doing that, I think it accepted responsibility for putting material in that could potentially be dangerous.

But the day-to-day working out of protective schemes to protect workers had to be done at the site of the work by the employer.

We made surveys of these 131 shipyards, but our force was limited in number, and we resurveyed most of them, but our visits were few and far between, and there had to be a day-to-day effort on the part of the employer to furnish full protection at all times. So it was a shared responsibility, I'd say, the Government and the employers.

Mr. MURPHY. Mr. Connolly.

Mr. CONNOLLY. I don't want to be amusing, but I was rather surprised at the attorney from the Justice Department saying they were having a sales program in the War Production Board to sell asbestos. I think we had a sign downstairs, "Fuller Brush Men not allowed," and I can't imagine anyone trying to sell the Government asbestos.

The Government was interested, along with these other critical items, to get the shipbuilding program under way, so the Government didn't have to go into any approach from anybody selling asbestos. That was an innate part of the Government's requirements to get this production under way during the war. There was no attempt to be selling asbestos. That was a critical material that the Government was seeking. The Government was in charge. They weren't concerned about a sales program from an asbestos company.

Mr. MURPHY. In other words, you directly contradict his statement that the manufacturers went around knocking on doors and saying, will you buy our asbestos?

Mr. CONNOLLY. Oh, no. That sounds like a Jackie Gleason program. There was nothing like that at all.

It was like the stock exchange the day of the crash, the tension was there, even before the war. I was with the Office of Production Management. I worked for Mr. Stettinius. He was the director of priorities at that time, former chairman of the United States Steel Company. When we reconstituted the War Production Board, because of my experience in handling priorities which were not too critical before the war broke out, I worked with General Denton, former executive vice president of the Mellon Bank, and several others, and we could understand the idea of setting up these control units. We had representatives of every claimant agency. Those were the agencies that required material during the war.

While originally the priority system worked rather effectively, after a while, the double A's and double A-2's became totally counterfeit money. So the whole organization was taken care of right there within the special rating division.

These members from an industry that worked in my control board or represented the Army, the Navy, and other agencies we, who headed up the industry divisions, became Government officials. We were all part of a Government engaged in fighting a war. We didn't think of an asbestos company, or a rubber company, or anybody else. We needed their materials.

I can't talk about the past of the asbestos industry or the future. I can only tell you what happened during those very critical war days, and there is no question in my mind, without passing any comment on the position of the asbestos companies today, one way or another, they were certainly under Government control during the war.

Mr. **Murphy**. As I take it then from your testimony, the Government made the decision that asbestos needed to be used in the shipbuilding industry.

Mr. **Connolly**. No question.

Mr. **Murphy**. And that as a result of that first decision, the Government established your agency which said, go out and lay your hands on all the asbestos you can get, because it's a priority material. Is that correct?

Mr. **Connolly**. Right.

Mr. **Murphy**. Then after the Government made those two moves, the Government then allocated the asbestos to whatever priority manufacturer they decided should use it.

Mr. **Connolly**. That's right.

Mr. Chairman, that was to determine an easy flow of the allocation of asbestos at that time.

I might point out, because the asbestos went into all of the insulation work and so forth, so our problem was usually with the end products, although asbestos was an integral part of that final utilization of the end product.

But I want to make one thing clear, to take exception again to the fact that somebody was selling something to the Government during the war period, and we were trying desperately to make sure that asbestos and all these other critical items were certainly made available to the military and the shipyards.

Mr. **Murphy**. Were there other materials that were available that could have replaced asbestos?

Mr. **Connolly**. No way, because the Government made the specifications. The Government made the specifications of what was required for the Navy and Maritime Commission for the shipbuilding program. The Government wrote the specifications, and, incidentally, in the many meetings that we had, I didn't engage in any of these meetings until the industry division could not solve the conflicts. So it was usually the specifications that became of great importance.

I want to point out, when sometimes one of the claimant agencies were looking for a triple-A rating or a directive and they wanted to change the specifications, suggesting that that would probably do the work, they were turned down because the specifications were specifically written. The Government wrote the specifications.

Mr. **Murphy**. May I ask Mr. Morgan—Mr. Morgan, were you an industrial hygienist in those years—1943 and 1944?

Mr. **Morgan**. 1942.

Mr. **Murphy**. 1942?

Mr. **Morgan**. Yes.

Mr. **Murphy**. OK. Did the Government know of the danger of asbestos at that time?

Mr. **Morgan**. Yes.

Mr. **Murphy**. They knew it insofar as you told us, asbestosis alone. That was the only known——

Mr. **Morgan**. That's correct, yes.

Mr. **Murphy**. Did the Government do anything, or could the Government have done anything, to abate this danger without harming the war effort? Would you address that particular aspect?

You knew of the problem?

Mr. **Morgan**. Yes.

Mr. **Murphy**. What could you do about it and to what extent, given the conditions at the time that Mr. Connolly has mentioned?

Mr. **Morgan**. Asbestos came into widespread use in Navy vessels in the 1930's, and one of the reasons was that it afforded heat protection to critical parts of the ship.

Mr. **Murphy**. Were there other suitable materials available?

Mr. **Morgan**. Yes, but asbestos had a more effective action in protecting the equipment and was also lighter, and in the 1930's ships were being built under a treaty which restricted the weight. So the less weight they put into insulating materials, the more they could put into armor.

Mr. **Murphy**. And we were a part of that treaty, I understand.

Mr. **Morgan**. We were, and we lived up to it, and so asbestos became the preferred insulating material in Navy ships. When World War II came upon us very suddenly, there wasn't time to seek out, and find, and test substitute materials. It was natural to go along with the material that had been found satisfactory for that particular purpose.

Knowing that asbestosis could result from overexposure to asbestos fibers in workplaces, these minimum requirements singled it out as one of the diseases that had to be prevented and suggested several means, which I recited in my summary, to bring about this protection of workers.

Mr. **Murphy**. Mr. Williams.

Mr. **Williams**. Thank you, Mr. Chairman.

Mr. Morgan, you have indicated that, in your judgment, the Government had ample reason to understand some of the dangers of asbestos. What did you know personally about the dangers of asbestos or about the disease resulting from the material?

Mr. **Morgan**. My knowledge of it came about in 1942 when I attended that course at Harvard School of Public Health, and there were made available to us published reports of studies that had been done, mostly in Great Britain, in the late 1920's and published in 1930, in which medical studies revealed disease existing and engineering studies revealed excessive dustiness in the asbestos handling shops. That was the Merewether report, His Majesty's Stationery Office.

Mr. **Williams**. Tell me about your thoughts at the time. Were you surprised at the dangers, or were they presented in such a way that it didn't seem to be a desperate situation?

Mr. **Morgan**. Asbestosis was presented to us as one of the recognized occupational diseases, others being lead poisoning, silicosis, manganese poisoning, and a whole variety of them, which had come to be recognized at that time as resulting from overexposures in industrial occupations.

At the same time, there were being developed methods of controlling the exposures to the degree that safety could be accomplished.

Mr. **Williams**. Were you convinced that the material could be handled and applied safety, given proper uses of the controls?

Mr. **Morgan**. Yes, I was.

Mr. **Williams**. Were you satisfied that those controls were in place during your inspections?

Mr. **Morgan**. I found places where they were not in place and had to make recommendations that changes be made.

Mr. **Williams**. Were you or the Government vigorous in pursuing those recommendations to see that they were carried out quickly?

Mr. **Morgan**. We didn't act on an emergency basis, but in the course of our survey we did discuss these findings before we left each shipyard with the proper authorities, both Government and contractors' men.

Mr. **Williams**. Give me your sense of urgency back in those days. When you would leave a site where the use of asbestos was considerable and many men were handling it in ways that I assume you thought might be dangerous, and you made recommendations to adapt certain controls to protect these men, when you would leave that site, would you leave it with the thought that these fellows handling this asbestos back there are in significant danger, I ought to do more than I'm doing, I'm going to get back right away to see that these controls are enacted, I'm going to tell my superiors that these fellows are in significant danger, or was the degree of danger that high? Was your understanding of it that intense?

Mr. **Morgan**. I did not regard it in the same way in which I would recognize an acute danger. For example, if welders were in a tightly enclosed space welding on galvanized steel, it was quite obvious that, within the next 24 hours, some of them would get metal fume fever, and something had to be done immediately to prevent that.

With asbestosis, it was recognized as a slowly developing disease, occurring after long periods of exposure. That was the history of asbestosis as it was found in this country and in England. So it was not an emergency situation.

I was a staff officer. I exerted scientific knowledge in making a judgment on these conditions and passed that information on with my recommendations to the line officers who were in a position to order equipment to alleviate the exposures and to carry out changes in work procedures and whatever had to be done.

Mr. **Williams**. One final question. Now that you look back upon the inservice information, education training information, which you received about asbestosis and the dangers of using the material, and as you reconsider the orders that you would give at the various sites to place firmer controls on the use of the asbestos, knowing what you know now, are you relatively convinced that the information that you received during those periods and the mechanisms for control that were within your jurisdiction were both adequate?

Mr. **Morgan**. Looking back on it now, I think that much more should have been done, but the facts that we had at hand did not indicate to us at that time that much more should have been done immediately.

BEST COPY AVAILABLE

Mr. **Williams**. One followup on that. As you look back, do you recall any incident or any person who may have known more about the potential effects of the disease and yet didn't quite share with you the proper concern, or was there any incident which would indicate evidence to you that the Government really did understand the urgency of this and yet was not properly relaying it to you nor properly applying the controls necessary to protect the workers?

Mr. **Morgan**. I believe that there was nothing known about health effects of asbestos that was not presented to us at that time.

The study that I mentioned, Merewether & Price in England, was followed up by studies in this country by Lanza, who did the work for the Metropolitan Life Insurance Co., but his work was published as a public health report, and a study by the Public Health Service under Dr. Driessen.

Using the techniques that were available and the diagnostic tools that were available at that time, they went as far as they could in trying to determine the extent of the disease processes that were caused by asbestos, and those reports were published in the open literature. It wasn't confined to the manufacturers of asbestos products, it was available to all who were interested and concerned, and that continued for quite a long period after that.

Mr. **Williams**. Thank you.

Mr. **Murphy**. Thank you, Mr. Williams.

Mr. Bartlett.

Mr. **Bartlett**. Mr. Morgan, to follow up on that a bit, I wonder if you could tell us, in your mind, what was your responsibility and the responsibility of the Government at the shipyards. Were you responsible in some way for the health and safety of the workers? Were you able to make safety regulations or to supervise the shipyards, or were you responsible more to ensure that the Government specifications were being carried out, or both?

Mr. **Morgan**. The reason for my being in that position was to try to help protect the health of shipyard workers.

Mr. **Bartlett**. Your job, on behalf of the Navy, was to protect the health of the shipyard workers. Is that what you said?

Mr. **Morgan**. Yes, it was, and the way it was set up was that I, having had training in industrial hygiene, and trained to recognize industrial health hazards and to evaluate them and suggest controls, I would work through the Navy's Supervisor of Shipbuilding who controlled the Navy contract shipyards and the resident plant engineers of the Maritime Commission who controlled those yards that were building ships for the Maritime Commission. They were the line officers who were enforcing the Navy and the Maritime Commission's minimum requirements.

Mr. **Bartlett**. You were a Navy employee—a government employee?

Mr. **Morgan**. Yes.

Mr. **Bartlett**. We had testimony on the *Shuman* case, for example, that's on the record, in which there is testimony that the inspector's only job was to see that the vessels were built in accordance with the Navy plans and specifications, but your job was more than that, you're saying?

Mr. **Morgan**. Yes. It dealt with the health of the workers.

Mr. **Bartlett**. Mr. Connolly, I wonder if you could tell us how different, if at all, was the Government's control over asbestos from that of other substances on the list of strategic and critical materials.

Mr. **Connolly**. Would you repeat that?

Mr. **Bartlett**. Was the Government's control over asbestos somehow different from the Government's control of other substances on the list of strategic and critical materials?

Mr. **Connolly**. No. It was considered a critical item, and that was established by the requirements committee. In other words, this is an item that had a high priority or a directive by the very fact that it was a critical item. So there was no differential between another critical item and asbestos in view of the fact that it was established as a critical item, predicated on the decision of the requirements committee, naturally gave it preferential treatment.

Mr. **Bartlett**. There were other materials on the list of course.

Mr. **Connolly**. Oh, yes, about 29.

Mr. **Bartlett**. I think cotton was on the list—raw cotton. Do you recall?

Mr. **Connolly**. I believe so; I'm not quite sure. Zinc, copper, and all of the basic—rubber—all of the basic elements were on that list.

Mr. **Bartlett**. Would you have a concern that if we were to establish the Government's liability for health and safety of workers in working with asbestos, which was on the list of strategic and critical materials—would we create a precedent then for establishing the Government's liability for workers who were injured as a result of cotton, for example, in some sort of an occupational disease?

Mr. **Connolly**. Congressman, that was not my concern. I had enough problems with the working of the priority system.

I'd like to point out, if I can, as clearly as I can, just exactly what was going on during the war. At one stage, when it was very critical, we had top military officers such as among others General Lucius D. Clay, Admiral Ireland, General Groves—he was responsible for the Atomic Bomb Program—and we had a meeting which I attended, and it was highly confidential and highly secret, and the nature of it was, while we respect and need the military soldiers in our combat, it was material, material, material. It was made very clear that, in the case of the Manhattan district, which General Groves administered, that we were in a 60-yard dash with the enemy. So let me point out that all of the work—all of the effort that we did was under tremendous pressure.

I often think, you know, they talk about the harmful ingredients of asbestos; when I remember the aggressiveness, the concern, the fear—if you want to use the word—of the top military people like General Eisenhower's associate, Gen. Lucius D. Clay, I'm sure that if someone came in and started to talk, well dedicated, about perhaps the harmful effects of asbestos, they'd say, "How about those boys getting killed over there? You're talking about something that's going to happen 25 or 30 years from now," asuming that that was the basis of the scientific or medical research at all. The whole purpose was to win the war.

We're sitting in here today. We're all very comfortable. We're asking questions. We're answering questions. The tension was there. The atmosphere was charged. It was, "Win the war; get those materials out," and if there was some question at that time, in my opinion—my studied opinion--about some harmful effects that would take place years from now, no matter how well researched or well dedicated, if you can understand the psychology of the war, I think they wouldn't pay any attention.

Mr. **Bartlett**. Mr. Chairman, thank you for these two witnesses. I think they have been very helpful and enlightening.

Mr. **Murphy**. Thank you very much, gentlemen. It was a pleasure having you with us today. Thank you for coming back in to Government service.

Mr. **Connolly**. Thank you.

Mr. **Morgan**. Thank you.

[Additional material submitted for the record follows:]

PREPARED STATEMENT OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA ON H.R. 1626

AGC is:

More than 32,000 firms including 8,400 of America's leading general contracting firms responsible for the employment of 3,500,000-plus employees;

110 chapters nationwide;

More than 80% of America's contract construction of commercial buildings, highways, industrial and municipal-utility facilities;

Approximately 50% of the contract construction by American firms in more than 100 countries abroad.

The Associated General Contractors of America (AGC) represents more than 30,000 firms including 8,400 of America's leading general contracting companies which are responsible for the employment of more than 3,500,000 employees. These member contractors perform more than 80% of America's contract construction of commercial buildings, highways, industrial and municipal-utility facilities.

AGC appreciates the opportunity to present its views on the issue of occupational disease.

AGC believes that there is no need for new federal legislation applicable to occupational disease in the construction industry for the following reasons:

state laws presently provide for coverage of occupational diseases;

injured employees are covered under the state law of the domicile of the employer or the state in which the injury occurs and the injured employee can pursue the claim in the state with the most advantageous state law.

AGC believes that the proposed Asbestos Workers' Recovery Act, H.R. 1626, is another example of the mindset that the federal government is the solution to difficult situations which confront the economy. State legislatures are considering and enacting ever-increasing protection for injured workers and accomplishing this where the responsibility belongs—at the state level.

AGC is concerned that enactment of legislation by Congress affecting workers' compensation would federalize a process that is best handled at the state level. Efforts to further improve state workers' compensation laws would be retarded by removing a part of the responsibility for workers' compensation matters from the state level where it is most responsive to the people affected by such compensation. Removing the responsibility through federal legislation that the states have for their own programs is a thinly veiled violation of states' rights.

AGC is also concerned with the movement toward federal legislation in the occupational disease area in light of the sparse documentation regarding the need for such legislation. Information about the causes, scope and definitions of occupational disease to date is generally inconclusive and mandates study instead of yet another federal program.

If the problem of occupational disease is significant, we are surprised that a groundswell effort for reform has not occurred at the state level where, presumably, such reform would be expected to be initiated. A report by the California Workers' Compensation Institute a few years ago, for example, noted that only 1.6% of claims filed involved occupational disease and that asbestos claims were less than .3% of all claims. It would seem that the small incidence of claims in this area hardly warrants yet another federal program.

The intrusion of the federal government in state workers' compensation programs is unwarranted particularly when an examination is made of the number of states and jurisdictions that cover occupational diseases. Currently, all states and jurisdictions cover all occupational diseases including those diseases caused by exposure to asbestos. AGC questions whether workers, employers and the public interest will be well served by the addition of a federal function when effective state programs already exist to address the issue of occupational diseases.

The ramifications of any federal occupational disease legislation on the national economy would be profound particularly if it follows, as is likely, the course of the Black Lung Program. This program has grown from a temporary program estimated to cost less than a total of $90 million into a permanent program costing more than $2 billion annually. This proposed new federal program would disrupt underwriting, ratemaking, availability and procurement of insurance coverage for workers' compensation. AGC questions the need for such a potential expense, particularly in the absence of a demonstrated need for such legislation.

For these reasons, the Associated General Contractors of America believes it is not in the public interest to create a new and unneeded federal program.

PREPARED STATEMENT OF THE COMMITTEE OF EQUITY SECURITY HOLDERS OF MANVILLE CORP.

Mr. Chairman: We appreciate the opportunity to submit this statement on behalf of the statutory committee appointed to represent the Equity Security Holders of Manville Corporation. There are more than 23,500 holders of record of Manville's over 24,000,000 common shares, located in every state of the United States and the District of Columbia, as well as over 22,000 holders of record of the over 4.6 million preferred Manville shares, located in every State of the Union and the District of Columbia. The shareholders voice should be added to those discussing H.R. 1626.

Of the more than 23,500 individual holders of record of the common shares of Manville Corporation, over 20,700 are men, women and joint tenants; 185 are pensions, profit sharing plans and unions. Over 10,000 holders of Manville common shares have fewer than 100 shares and over 21,000 Manville holders own fewer than 500 common shares. Manville's stockholders are diverse; most are individual investors, not large companies. The shares owned by all of the directors and officers of Manville represent less than .4% of the issued and outstanding shares of the company.

The Manville shareholder is sympathetic to the plight of the diseased worker. In fact many Manville corporation employees are also shareholders. These employees, as well as many unions, pensions, and individual investors, are all at risk if the problem of the diseased workers is not solved.

There is a pressing need for Federal Legislation in this area. As indicated in the proposed Bill, over 25,000 claimants have filed asbestos-related law suits and litigation is growing at a rate exceeding 6,000 new cases a year. The courts are clogged with asbestos cases and of every dollar spent to resolve such claims only 39 percent actually goes to the claimant. While the Agreement concerning asbestos-related claims (i.e. the "Wellington Facility") between certain producers and insurers is a major step forward, its deficiencies prevent it from obviating the need for Federal Legislation.[1]

All present and future asbestos claimants are entitled to fair and just compensation. Responsibility for the burden of such compensation must be borne both by the asbestos industry and the Federal Government. The Subcommittee is to be commended for its work in attempting to fashion a legislative scheme. HR 1626, the Asbestos Workers Recovery Act, is the best legislation proposed to date. After years of study by the Subcommittee, a Bill has finally been introduced which constitutes a comprehensive solution to the asbestos compensation crisis. The following specific points are to be highlighted.

1. A majority of asbestos disease victims claim to have been exposed to asbestos while working directly or indirectly for the federal government in shipyards during World War II. During World War II, one hundred percent of all available asbestos was allocated by the War Production Board and each and every asbestos-manufacturing company was required by law to give the federal government requirements

---

[1] Joe Hollingsworth, counsel to UNR Industries, Inc. and Eagle Picher Industries, Inc. has pointed out in his testimony that Wellington is deficient in that plaintiffs may still sue in the tort system and the government is not a party to Wellington.

the highest priority.[2] Following the war, the government sold asbestos fiber from its stock piles for use in shipyards and other commercial purposes. During World War II, the government had knowledge of the disease of asbestosis and set minimum requirements to prevent occurrence of such disease but failed miserably to have its shipyards comply with such minimum requirements.[3] For these and other reasons, we believe the federal government bears direct responsibility for the problem and the proposed legislation apportions to the federal government its share of the financial responsibility concomitant therewith.

As both shareholders and taxpayers, we support H.R. 1626 and its provisions for governmental contribution to the legislative scheme. As stated before the Subcommittee, by aggregating (a) the cost to the federal government in processing asbestos tort claims, (b) the cost of staff work associated with federal legislation, (c) the dollars spent by the federal government on welfare and social insurance, and (d) the hundreds of thousand of cases pending against the federal government for its responsibility in this area, absent a legislative solution, the federal government's budget could be adversely affected by asbestos disease in an amount approaching $9.5 Million. Enactment of the proposed legislation would obviate this result.

2. In order to solve the nationwide asbestos health crisis and its impact upon the courts and all parties to litigation, the remedies provided for affected workers under a legislative scheme should be exclusive. Section 301 of H.R. 1626 provides the important exclusivity feature without which any legislative attempt to solve the asbestos health crisis will be futile. With both industry and the government paying their fair share of compensation and proper functioning of the claims procedure set forth in Section 102 of the bill, affected workers will be ensured of receiving their just compensation. The legislative scheme set forth in the proposed legislation should provide prompt and equitable compensation, obviating the need to resort to a tort system which has been called inequitable, inefficient and costly. Establishing a claims-handling procedure supplanting such a tort system, should be a goal of any proposed legislative remedy to the asbestos-health crisis. The exclusivity feature of H.R. 1626 accomplishes this goal.

Furthermore, the unlimited wastefulness associated with the tort system has led to the bankruptcy of more than one former asbestos producer, compounding the problem. Nether industry nor victims benefit from a company operating as a debtor-in-possession under the bankruptcy rules. H.R. 1626 will force industry to assume its full share of responsibility, but the exclusivity feature will enable each company to calculate sufficient cash flows to meet its obligations to the claims-handling facility thereby (a) obviating the need for other companies to seek the protection of the bankruptcy code and (b) allowing reorganization of Manville and other Chapter 11 companies. This will result ultimately in higher dollars for claimants.

On behalf of all of the shareholders of Manville, who look forward to prompt passage of the Asbestos Workers Recovery Act, we wish to thank the Chairman and the Subcommittee for this opportunity to be heard.

PREPARED STATEMENT OF G. EARL PARKER, SENIOR VICE PRESIDENT, MANVILLE CORP., DENVER, CO, JUNE 25, 1985

Mr. Chairman, this statement is submitted to complement the record of the Subcommittee's hearing of June 25, 1985, regarding the responsibility of the United States Government to participate in a fair resolution of the asbestos disease tragedy now confronting the nation. As you know, Manville supports the fundamental approach embodied in your bill H.R. 1626, the Asbestos Workers Recovery Act, and is prepared to assume its responsibilities to compensate workers injured by asbestos under an affordable legislated program.

During its appearance before the Subcommittee, however, the Justice Department was less forthcoming, attempting to ignore all questions regarding the extent of government involvement with asbestos. Instead, the Department's strategy apparently is to stonewall on the facts proving the government's culpability, in favor of repeating a litany of allegations regarding private asbestos manufacturers' responsibilities.

---

[2] Reference is made to the testimony of Frank Connolly, former director of the War Production Board Special Rating Division before this Subcommittee on June 25, 1985, in which he stated that "on February 9, 1943, the Board issued Conservation Order M-283, which placed asbestos textiles under 100 percent allocation by the War Production Board, surpassing even a[n] AAA priority rating. [This] permitted total control of both the distribution and use of the products."

[3] In his testimony before the Subcommittee, James Morgan, an industrial hygienist, stated that ". . . it is indisputable that the government's knowledge of asbestosis as an occupational disease caused by overexposure to the inhalation of asbestos dust was firmly established more than 40 years ago" and "although some shipyards were better than others in implementing asbestos dust control measures, asbestos dust was still on the whole quite a serious problem."

It is worth emphasizing that on the central issue before the Subcommittee—what the United States knew about asbestos hazards, when it knew about them, and what it did or didn't do to correct them—the Justice Department is virtually silent.

Indeed, the accumulated evidence is indisputable that the federal government was aware at least by 1939 that high levels of asbestos dust could be harmful, the federal government knew at that time that dangerous exposures to asbestos were occurring in both naval and private contract shipyards, and, in the first epidemiological study of shipyard exposures to asbestos, undertaken by government agents and published in 1946, the federal government purposely withheld crucial evidence of massive overexposures to asbestos in the World War II effort to revitalize the Allies' naval forces.

As James Morgan's eyewitness testimony before the Subcommittee affirms, by the beginning of World War II the Navy knew of the risks associated with excessive exposure to asbestos, knew how to handle asbestos products safely, and in fact, taught these methods to its industrial hygienists. Any question regarding the common public knowledge of asbestos risks was answered by the federal government itself. In its legal Answer to the first complaint that Johns-Manville filed against it in the United States Claims Court (Claims Court No. 465-83C), the Justice Department acknowledges that between 1898 and 1945, there were over 200 articles published in medical, safety engineering and insurance journals describing the health hazards of asbestos.

Government experts had as much access to this public literature as anyone else and, hence, the government was generally knowledgeable of the potential harm associated with asbestos. Moreover, in 1938 the United States Public Health Service, a government agency, undertook its own research on the hazards of asbestos and published a study of asbestosis in asbestos textile workers. That report (Public Health Bulletin No. 241, August, 1938, attached as Appendix #1) concluded:

> It would seem that if the dust concentrations in asbestos factories could be kept below 5 million particles (the engineering section of this report has shown how this may be accomplished), new cases of asbestosis probably would not appear.

Government knowledge that it was placing shipyard workers at serious risk is clear from contemporaneous statements by other government officials and agencies. The 1939 Annual Report of the Navy Surgeon General (pertinent sections attached as Appendix #2) discusses a medical survey of shipyard workers in which the risk of future disease manifestation was recognized: . . . it is not considered that the negative findings precluded the future development of asbestosis by continued exposure under present occupational conditions.

The clear implication of this comment is an awareness that shipyard workers were at risk from the "present occupational conditions" then permitted in government-controlled workplaces. This conclusion is corroborated by a March, 1941, memorandum to Admiral McIntire, then Surgeon General of the Navy, from the Navy Commander of Preventive Medicine (attached as Appendix #3):

> We are having a considerable amount of work done in asbestos and from my observations I am certain that we are not protecting the men as we should. This is a matter of official report from several of our Navy yards.

Working conditions for shipyard workers did not improve. A classified September, 1942, industrial health survey of the Bath Iron Works Shipyard by the Navy and Maritime Commission found that the conditions in this shop present a very real asbestosis hazard and immediate steps should be taken to segregate the most dusty processes into a well ventilated area.

The only rational conclusion that can be drawn from these documents is that the government was keenly aware of the potential harm associated with excessive asbestos exposure, and acknowledged in classified, internal reports that hazardous conditions in fact existed within the workplaces it controlled.

Mr. Chairman, when confronted with its own documents showing government knowledge of asbestos risks, the Justice Department often retreats to new battlelines—arguing next that even if the government did know about asbestos risks, it wasn't responsible for working conditions in private shipyards. The evidence is clearly to the contrary. As a March 26, 1945, memorandum from the Maritime Commission's Director of the Division of Shipyard Labor Relations indicates to his employees (attached as Appendix #4):

> The question has recently been raised as to the extent of your authority in maintaining the [joint Navy—Maritime Commission's] Minimum Standards with respect to subcontractors whose employees are working in shipyards.

By reference to the Minimum Standards, you will see that the Joint Letter appearing in the forepart of the bulletin, signed by the former Secretary of the Navy, Frank Knox, and Admiral Land for the Maritime Commission, mentions workers *in* shipyrads. The third paragraph of this letter is specific in this respect, where it talks of "one million workers *in* shipyards" and not employees of shipyards.

You have ample authority to insist that subcontractors employing men in shipyards shall observe the standard safety and health practices.

Documentary evidence makes clear that government health and safety personnel in the field possessed the authority that they were empowered to control private shipyards. This is consistent with the views of high ranking government officials, all the way up to Secretary of the Navy Frank Knox. In a March 4, 1943 memorandum (attached as Appendix #5) distributing the government's "Minimum Requirements for Safety and Industrial Health in Contract Shipyards," Secretary Knox states explicitly that the Minimum Standards appl[y] to all private shipyards having either Navy or Maritime Commission contracts or both.

The United States was well aware that it had assumed responsibility for the health and safety of World War II shipyard workers—and was failing to fulfill that obligation. To make matters worse, the federal government engaged in a cover-up designed to keep shipyard workers in the dark about the hazardous asbestos conditions in its shipyards. This cover-up was accomplished in two ways: first, through the use of classification codes to restrict access to industrial health surveys, and second by the failure to disclose all pertinent data about asbestos exposures in the one and only public report made by the government regarding asbestos exposure in World War II shipyards.

Specifically as to the first point, industrial hygiene surveys of shipyards during World War II were stamped "classified" pursuant to the Espionage Act (18 U.S.C. 793(d)), and disclosure of their contents thereby prohibited by law. It is these surveys that most vividly demonstrate that the government was aware of the potential risks of asbestos exposure and that dust levels in shipyards often were many times higher than the level considered to be safe at the time. Because its disclosure was prohibited by the Espionage Act, neither workers nor asbestos product manufacturers had any reason to believe that the government was not complying with the 5 mppcf standard that had been recommended in the 1938 Public Health Service report, and subsequently adopted by the American Conference of Government Industrial Hygienists and incorporated into the government's 1943 "Minimum Standards" manual.

Regarding government concealment of facts and misrepresentation in its public reports, in 1946 the Navy approved publication of a wartime survey of workers who had been exposed to asbestos in Navy and Navy contract shipyards. That publication, "A Health Survey of Pipe Covering Operations in Constructing Naval Vessels" was authored by Drs. Fleischer and Drinker, the same persons who had conducted many of the earlier shipyard surveys citing "asbestosis hazards." After careful editing to excise contradictory evidence, the published version of the 1946 Fleischer and Drinker report stated that only a few cases of asbestosis had been found in over 1,000 men examined, and from this concluded that shipyard insulation work "(was) not a dangerous occupation."

The government-approved Fleischer-Drinker report concealed findings of asbestosis in other shipyards. It has now been learned that the authors had also surveyed other shipyards in which, of a total of thirty-eight shipyard worker x-rays reviewed, twelve showed significant x-ray changes consistent with exposure to asbestos, and six were diagnostic. Dust counts at these shipyards were measured at between 34 million and 52 million particles per cubic foot (dust counts report attached as Appendix #6). In effect, the report concealed evidence that, at least in certain instances, more than 30 percent (12 of 38 x-rays) of the exposed population in a shipyard showed evidence of injury, and that dust levels in the shipyards were seven to ten times higher than the level that the Public Health Service thought to be safe.

While it must be remembered that the nation was at war and shipyard productivity was a paramount concern, it appears that other considerations may have motivated the government's decision not to disclose the hazardous nature of the workplaces it controlled. As the Maritime Commission's Dr. Drinker wrote in 1945 to Admiral Mills of the Navy Bureau of Ships (attached as Appendix #7).

Enclosure (A) contains the results of the study authorized by the Bureau of Ships in Reference (a) and is forwarded for your consideration. * * * We suggest that a copy of the conclusions, page 26, of the present report be given to your own division of insurance and the insurance division of the Maritime Commission. *Both are concerned with possible damage suits from workers in shipyards,* (emphasis added)

The Navy's failure to protect shipyard workers did not end with the end of the war. Throughout the 1950's, 1960's, and 1970's the Navy was aware that extremely hazardous asbestos dust conditions existed in its own shipyards, but again failed to enforce safe handling procedures, provide adequate ventilation or require the use of respirator devices by its own workers. Literally hundreds of industrial health surveys and asbestos dust counts attest to the government's shocking indifference towards worker exposure to asbestos. One comprehensive example serves to prove the point. In a 1979 memorandum from R.P. Hobby, Commanding Office of the Naval Regional Medical Center in Long Beach, California, to the Commander of the Long Beach Naval Shipyard, (attached as Appendix #8), Hobby reports his "best estimates of the exposures of the pipe coverers and insulators working on the ships and in the Pad shop from 1943 to the present." Hobby reported that estimated asbestos exposures routinely violated accepted standards, often by multiples of ten or more. His report is littered with telling observations:

1943-1945—Installation of 100% Amosite blanket. An estimated 50% of the time spent installing asbestos insulation at 106 f/ml, 30% in major ripout at 280 f/ml, and 20% in minor ripout at 44 f/ml. No respiratory protection was worn.

1946-1960—100% Amosite blanket was rarely installed. An estimated 50% of the time spent installing asbestos insulation at 106 f/ml, 30% in major ripout at 280 f/ml, and 20% in minor ripout at 44 f/ml. No respiratory protection was worn.

1961-1975—An estimated 50% of the time spent in installing asbestos insulation at 106 f/ml, 15% removing loose Amosite asbestos at 280 f/ml, 15% removing other asbestos insulation at 140 f/ml, 20% spent on minor ripout at 44 f/ml. Respiratory protection was worn about one-tenth of the time.

As the Hobby memorandum indicates, asbestos exposures at government-controlled workplaces were excessive much of the time, including periods well after World War II and well after information regarding the carcinogenicity of excessive asbestos exposures was determined. As a memorandum written in the 1980's by the Mare Island Naval Shipyard Commander confirms, too often the federal government's public statements that it was controlling asbestos exposure was a case of the government saying "do as I say, not as I do." That memorandum (attached as Appendix #9) indicates:

As review of our asbestos program over the last two weeks shows that efforts have not been successful. Daily we find problems in Public Works and Production Departments and we have even found asbestos insulation in our Supply Department. *These findings would not be significant if they were expected, but in 1976 and for the last four or five years, we have been continually reporting to NAVSEA that we have controls and are controlling thermal asbestos insulation.* (emphasis added)

Perhaps the federal government's attitude towards asbestos contol is best characterized by its exclusive concern only with good public relations. As Captain McArther, Commander of the Pearl Harbor Naval Shipyard, indicated in 1978—some fourteen years after the initial Selikoff findings were announced (Appendix #10).

I have recommended to Admiral Hoffman that it is time for the Shipyards to close ranks by implementing a solid and unified asbestos control/medical monitoring program that will meet the requirements of the law, and naval instructions. In my view, the best of all possible worlds would be, to do this rapidly and now, to get ahead of the power curve before the media makes us look like we are being dragged kicking and screaming into doing what is legal and "the right thing."

Ignoring all of this evidence, the Justice Department in its testimony claims that the Federal government was somehow duped or pressured into using asbestos products by industry "puff pieces." To accept this argument in light of the evidence like that presented above, one must believe, as the Department apparently does, that the Navy before, during and after World War II was run by trusting incompetents who blindly accepted whatever they were told by asbestos manufacturers—and presumably by suppliers of other Navy combat materials and equipment. Of course, nothing could be more preposterous.

More importantly, this argument is fundamentally inconsistent with the fact that the Navy had its own extensive testing laboratories, and a full cadre of engineers and technical experts who analyzed the characteristics of asbestos and other materials for fireproofing and insulation aboard its combat ships. Only after its own demanding scrutiny and testing did the Navy decide that asbestos products alone were acceptable for its purposes. Indeed, even after Johns-Manville produced an asbestos-free insulating material in the 1950's that passed on-ship performance testing with flying colors, the Navy continued to specify and purchase only asbestos-containing products. As government specification authorities indicated as early as 1933 (Attached as Appendix #11).

> . . . the Bureau wishes to assure you that it does not prepare specifications in the interest of any manufacturing source. All changes in specifications are dictated by necessities of the Naval service and are made after careful consideration.

In fact, it was the United States that wrote its own material specifications requiring the use of asbestos—and the first of these specifications can be traced back to the year 1887, some fifteen years before Johns-Manville was incorporated and years before any of its predecessor companies manufactured asbestos products for the government. It was the United States that declared asbestos a critical national defense material. And it was the United States that stockpiled asbestos and allocated the material so as to conserve supplies to meet military needs. In the World War II economy where conflicts had to be resolved and scarce resources divided between such crucial needs as the Manhattan project and the construction of landing craft for the Normandy invasion, there was no room for the federal government to provide free stockpiling services stockpiling for the convenience of private companies, as Deputy Assistant Attorney General characterized U.S. involvement with asbestos.

Fundamentally, Mr. Chairman, Manville believes that where identical commercial activity is involved, industry and government ought both be held accountable according to identical criteria. And in the asbestos tragedy, unlike many other alleged toxic torts, a history of intimate, direct government involvement in the import and sale of product, as well as the harmful exposure of workers, can be convincingly documented. Rather than continue to waste scarce public and private sector resources on intricate litigation strategies, it is time for the federal government to join industry in acknowledging a responsibility to injured asbestos workers and in constructing a nonadversarial means for compensating these victims.

[Appendixes retained in subcommittee files due to the volume of material.]

[Whereupon, at 11:40 a.m., the subcommittee was adjourned.]

BLANK PAGE

HEARINGS ON COMPENSATION FOR OCCUPATIONAL DISEASES

THURSDAY, SEPTEMBER 26 1985

House of Representatives,
Subcommittee on Labor Standards,
Committee on Education and Labor,
Washington, DC.

The subcommittee met, pursuant to call, at 10:05 a.m., in room 2261, Rayburn House Office Building, Hon. Austin J. Murphy (chairman of the subcommittee) presiding.

Members present: Representatives Murphy, Williams, Petri, and Bartlett.

Staff present: Richard J. Fiesta, counsel; Thomas F. Lamb, Jr., staff director; and Mark E. Powden, minority labor staff director.

Mr. **Murphy**. The Subcommittee on Labor Standards will now convene.

The subcommittee today begins hearings on the question of occupational disease compensation. Previously, the subcommittee has held hearings regarding asbestos compensation. Today we consider H.R. 3090 introduced by our colleague Pat Williams of Montana.

I hope that through these hearings and the previous ones that the problems involved with occupational disease compensation will come to light and that solutions to these problems can be attained.

We are joined this morning by the ranking minority member, Congressman Tom Petri. Mr. Petri, do you have an opening statement?

Mr. **Petri**. No, I don't, Mr. Chairman.

Mr. **Murphy**. Thank you, Mr. Petri.

And also Congressman Williams, who is also serving on a full committee, is sitting with us this morning. Mr. Williams, do you have an opening statement?

Mr. **Williams**. Yes, I do, Mr. Chairman. I thank you for holding hearings today on my bill, the Federal Occupational Disease Compensation Act of 1985.

This year we estimate that at least 23,000 Americans will die from work-related cancers. The cancer-exposed worker populations in the United States includes at least 11 million workers exposed to some 2,400 known or suspected cancer-causing substances or processes.

The bill that I have introduced responds to the needs of these workers and contains five important parts. Let me go through them quickly.

First, the bill recognizes that the existing State-based workers' compensation is inadequate to deal with the modern dimensions of occupational disease compensation program.

Second, the bill immediately establishes a compensation system for asbestos victims based upon a series of medical presumptions of disease if certain medically based criteria are met.

Third, workers retain their common law rights to sue responsible third parties. However, the bill provides that any third-party award is offset, dollar for dollar, against the total value of the workers' compensation award.

Fourth, the bill provides for an administrative trigger whereby the Secretary of Labor, based upon medical and epidemiological research conducted by the Secretary of Health and Human Services, engages in rulemaking to add additional diseases to the Federal Compensation Program.

The Government is directed immediately to begin such rulemaking on those substances and/or processes on which there already exists OSHA standards.

Finally, the bill recreates an exclusive Federal occupational disease compensation insurance fund whereby covered employers must purchase insurance to cover their liability under the law. This insurance fund would function much like existing workers compensation insurance, except that it is operated by the Federal Government. This is a practice proven by experience. The Federal Government already operates a number of insurance programs covering bank deposits, housing, flood, and other disasters, and various agriculture lending programs.

The Government also operates the costs of taking care of the victims of occupational disease and their families. Those costs are already being borne in our society. The tragedy is that they are being borne by the victims and to a lesser degree by the public.

We know that employers are not paying for the costs of occupational disease, except as they become defendants in tort law. We know that despite the public intention, the costs of production are not bearing the costs of occupational disease.

We also know that the public welfare system—Medicare, Medicaid, Social Security disability—are bearing much of the costs of uncompensated occupational disease.

We also know that the victims themselves—in addition to their pain and suffering—are paying for their own diseases through their life's savings and lost wages. Indeed, according to one Department of Labor study, occupational disease costs workers some $11 billion a year in lost wages alone.

What this all adds up to is a massive public and personal subsidy of American industry. Occupational disease compensation, like occupational injury compensation, should be a cost of production, a cost of doing business. But the cost of workplace disease has been shifted to the victim.

The bill before us today, Mr. Chairman, places these costs back where they belong—in the workplace or production process that caused the disease in the first instance. Only then, I believe, will employers begin to take the serious steps necessary to protect workers from the insidious exposures which cause these terrible, life-shortening diseases.

I believe the time for this legislation has come now. The demands of the American workers for a humane system of occupational disease compensation are great, and must be met.

I thank you, Mr. Chairman.

[The prepared statement of Hon. Pat Williams follows:]

OPENING STATEMENT OF HON. PAT WILLIAMS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MONTANA

I would like to thank the chairman of this subcommittee for holding hearings today on my bill, the Federal Occupational Disease Compensation Act of 1985, H.R. 3090. I look forward to working with my friend, Mr. Murphy, as this subcommittee proceeds to review this issue.

My friends, this year at least 23,000 Americans will die from work related cancers. The cancer exposed worker populations in the United States include at least 11 million workers exposed to some 2,400 known or suspected cancer-causing substances or processes. Some 100,000 die each year from occupational disease, while another 500,000 annually contract an occupational disease. In terms of cancer alone, the magnitude of the asbestos tragedy is large and continuing. According to the best studies available, between 4,000 and 12,000 asbestos-related cancer deaths per year are expected for the next 20 years. Unless effective legislative action is taken now, by this Congress, most of these victims will receive very little or nothing at all from either the tort or state worker compensation systems.

The bill that I have introduced responds to the needs of these workers and contains five important parts: First the bill recognizes that the existing State-based workers' compensation is inadequate to deal with the modern dimensions of occupational disease compensation program. In doing this, we are not—in a very real sense—reducing State efforts because, for all practical purposes, few, if any, of them are compensating for occupational disease. To make the point again, less than 10 percent of all occupational disease is compensated under the State program and then only after protracted litigation.

Second, the bill immediately established a compensation system for asbestos victims based upon a series of medical presumptions of disease if certain medically based criteria are met. The benefits levels provided are similar to those available to workers covered by the Federal longshoremens' and Harbor Workers Compensation Act.

Third, workers retain their common law rights to sue responsible third parties. However, the bill provides that any third party award is offset, dollar for dollar, against the total value of the workers compensation award. Given the relatively small amounts that the average victim actually gets from an average asbestos suit, we believe that this offset will serve as a disincentive to sue since most third party awards would be more than offset by the workers compensation benefit provided by this bill.

Fourth, the bill provides for an administrative trigger whereby the Secretary of Labor, based upon medical and epidemiological research conducted by the Secretary of Health and Human Services, engages in rulemaking to add additional diseases to the Federal Compensation Program. The Government is directed immediately to begin such rulemaking on those substances and/or processes on which there already exists OSHA standards.

Finally, the bill recreates an exclusive Federal occupational disease compensation insurance fund whereby covered employers must purchase insurance to cover their liability under the law. This insurance fund would function much like existing workers compensation insurance, except that it is operated exclusively by the Federal Government. This is a practice proven by experience. The Federal Government already operates a number of insurance programs covering bank deposits, housing, flood, and other disasters, and various agriculture lending program. The Government also operates the costs of taking care of the victims of occupational disease and their families are already being borne in our society. The tragedy is that they are borne by the victims and to a lesser degree by the public.

We know that employers are not paying for the costs of occupational disease, except as they become defendants in tort law. We know that despite the public intention, the costs of production are not bearing the costs of occupational disease.

We also know that the public welfare system—medicare, medicaid, social security disability—is bearing much of the costs of uncompensated occupational disease. We also know that the victims themselves—in addition to their pain and suffering—are paying for their own diseases through their life's savings and lost wages. Indeed, according to one Department of Labor study, occupational disease costs workers some $11 billion a year in lost wages alone.

What this all adds up to is a massive public and personal subsidy of American industry. Occupational disease compensation, like occupational injury compensation, should be a cost of production, a cost of doing business. But the cost of workplace disease has been shifted onto the victim. My bill places those costs back where they belong—the workplace or production process that caused the disease in the first place. Only then, I believe, will employers begin to take the serious steps necessary to protect workers from the insidious exposure which cause these terrible, life shortening diseases.

Mr. Chairman, the time for this legislation has come. The demands of the American workers for a humane system of occupational disease compensation must be met. Justice and human dignity require nothing less.

Mr. MURPHY. Thank you very much, Mr. Williams.

I regret to advise our witnesses that there is a vote on a suspension that was held over from Tuesday on interstate compacts and the members will have to recess temporarily and go over and cast their votes.

The first witness we have is Mr. David Pullen, the Director of Government Relations of the Manville Corp. He may assume the witness table and prepare himself as we run over. We should be back in about 8 to 10 minutes.

[Recess].

Mr. MURPHY. We are now joined by Mr. G. Earl Parker, the senior vice president of law and public affairs, and director of the Manville Corp., and Mr. Pullen. So if you gentlemen care to proceed, you may proceed.

STATEMENT OF G. EARL PARKER, SENIOR VICE PRESIDENT, LAW AND PUBLIC AFFAIRS, MANVILLE CORP., ACCOMPANIED BY DAVID E. PULLEN, MANAGER, U.S. GOVERNMENT AFFAIRS, MANVILLE CORP.

Mr. PARKER. Thank you, Mr. Murphy.

Manville Corp. has testified several times before this committee and other committees of the Congress in an effort to find a more rational means of providing compensation to people with asbestos-related disabilities. We have not been alone in this quest. Other manufacturers, the AFL-CIO, particularly the Asbestos Workers Union; the American Bar Association, and other institutions concerned with the operation of our courts, such as the Rand Institute for Civil Justice; and elements of the medical community, including the American Thoracic Society, the Heart and Lung Association, and various environmental science laboratories; have all cooperated in an effort to find a rational solution to this problem.

We have had the participation of such diverse national leadership as former Congresswoman Millicent Fenwick and Congressman George Miller, as Senator Gary Hart and Bill Armstrong, and are pleased to have the leadership of Congressman Murphy in this important endeavor.

The concern of the AFL-CIO for the protection and just compensation of its members and their families is eloquently demonstrated by their advocacy of the House bill H.R. 3090. We welcome the opportunity to work with them and to continue working with others in constructing a compensation program which will provide reasonable compensation to persons with asbestos-related disabilities.

The program as I see it should address the twin problems of asbestos—those being disease and litigation. As a disease phenomenon, asbestos is far and away the largest occupational disease tragedy known. The large number of people exposed during a long latency period has generated disease cases numbering in the tens of thousands.

It is encouraging to note that positive evidence exists that dust suppression measures taken in the 1950's and intensified in the 1960's and 1970's are proving effective in reducing asbestos-related diseases.

I am advised by medical experts in this area that past projections have grossly overstated the number of disabilities and deaths which will occur. Indeed, one prominent researcher has referred to asbestosis as a historic disease. Nevertheless, the number of cases is large, the suffering is real, and the disabilities do exist.

The problem is a problem that we face and is not one which is prospective or speculative.

The second tragedy associated with asbestos is its effect on our judicial system. Our courtrooms are clogged by thousands of asbestos-related cases. The tort litigation system has proven ineffective, haphazard, costly, and inefficient. It is a spectacle which further erodes public confidence in our institutions. Viewed in a broader perspective, product liability litigation and its unpredictability—as to amounts of awards, punitive damages, changing standards and legal duties—threaten to make United States industry uninsurable. Already such large diverse companies as General Electric, without any particular product liability problem, find it impossible to purchase product liability reinsurance in the London markets.

If product liability insurance cannot be purchased, then neither can bank financing be obtained. That threatens the innovation which our society requires if we are to continue to generate new levels of goods, new kinds of goods and services, new levels of jobs, and prosperity.

So, Mr. Chairman, we are pleased to see this committee and the other interested parties who will testify, turning in earnest to the task of fashioning a fair, efficient compensation program for asbestos-related diseases and perhaps for other occupational diseases as well.

I have several specific comments on provisions of H.R. 3090, but before addressing those I would like to turn briefly to the matter of cost. I recognize that I am testifying somewhat out of order in that the proponents of this bill have not yet been able to explain its overall impact. But I would ask the committee to bear in mind these concerns as the discussion on the bill unfolds.

No matter how well intentioned, Mr. Chairman, any legislation must be affordable. The cost attendant to H.R. 3090 are astronomical and totally outstrip the ability of the private sector to fund the bill. Further, they bear no relationship to the average awards being returned and paid in the tort system.

Using conservative assumptions, we have made a low range estimate that the cost of claims paid under H.R. 3090 through the year 2002 would be $7.279 billion, of which my company's approximate share would be $2.4 billion, or an annualized cost of $80 million.

Those figures are based upon disease projections of Dr. Alex Walker, a noted epidemiologist, and using his low range estimates.

Using Dr. Walker's high estimates, the total cost would be $24.3 billion, with my company's share being approximately $8 billion, or an annualized cost over the period when benefits would be paid of $267 million.

Mr. Chairman, I would add that other investigators such as Dr. Selikoff, have estimated an even greater number of claims, which could double the cost projections.

In addition to the cost of H.R. 3090 outstripping the ability of the private sector to fund the legislation, the benefits provided in the bill bear no reasonable relationship to prior claims experience. The average total disability claim for a worker in the construction industry age 55, with a wife 50 years old, which is fairly typical, would result in payments over 30 years of approximately $575,000. A partial disability claim for this same worker, assuming only 25 percent disability, would result in payments of approximately $144,000. These figures are dramatically higher than the average of $60,000 per claim documented by the Rand Institute for Civil Justice—studies with which this committee is familiar.

Mr. Chairman, these cost projections do not even include claims arising out of shipyards as those workers are covered by either the Federal Employees Compensation Act or the Longshore and Harbor Workers' Act and hence excluded from H.R. 3090.

Claims from the shipyards represent approximately 50 percent of the present asbestos disease claims filed, and that number is expected to rise in the future. Accordingly, the huge cost projections for benefits to be paid under H.R. 3090 do not even address half the problem.

Further, H.R. 3090 does not act to resolve the pending claims of which there are approximately 30,000 which may remain in the court system.

I would be happy to provide the subcommittee with additional information on our cost estimates. Suffice it to say that using extremely conservative assumptions, the cost of H.R. 3090 totally outstrips the combined resources of the private sector which alone is being called upon to fund the bill.

Fundamentally, H.R. 3090 and H.R. 1626, the Asbestos Workers Recovery Act, each see different problems and, therefore, each takes a different path toward a solution. Whereas, H.R. 3090 focuses on the employer/employee relationship and, therefore, a perceived need to reform workers compensation, H.R. 1626 focuses on third-party liability litigation and, therefore, the need to address the tort litigation system. Whereas H.R. 3090 seeks to address all occupational disease by a triggering mechanism which would bring into action other, perhaps less well understood, disease phenomenon, H.R. 1626 addresses only the unique circumstances of the asbestos tragedy.

And whereas H.R. 3090 seeks to address occupational disease problems prospectively and hence continues third-party tort litigation as one potential incentive for disease prevention, H.R. 1626, precisely because it is limited to the asbestos issue, addresses a problem that is fundamentally historical or retrospective in nature.

The injurious exposure has already taken place and asbestos products with high dust potentials are no longer being manufactured.

So, conceptually, H.R. 3090 in its present form does not, and apparently is not intended to solve the twin asbestos problems of disease compensation and third-party tort liability litigation.

Likewise, H.R. 3090 does not address a myriad of issues that are central to the tort liability problem: dissimilar awards for identical injuries; no award at all where legal liability cannot be proved even in the face of medical confirmation of asbestos injury; substantial awards to persons with purely speculative injuries; and absolutely grotesque waste that is inherent in the asbestos litigation system.

Mr. Chairman, it is evident to me that if the subcommittee decides that a uniform national workers compensation law is needed to address the broader concerns that underlie H.R. 3090, then the asbestos issue must still be resolved independently. In this manner, remedial legislation can be tailored to address the unique aspects of the twin asbestos problems of compensation and litigation which are fully differentiable from the main thrust of Mr. Williams' bill.

Assuming H.R. 3090 could somehow be affordable for Manville, there are other conceptual flaws in the proposal. I would mention a few. Exclusivity for employers is provided but not for third parties. Section 4(a) of H.R. 3090 makes the compensation under the proposed act an employee's exclusive remedy against a long list of entities: the employer, the employer's insurer, employees or agents of the employer, as well as officers and directors of the employers. Even collective bargaining agents, who themselves are often sued in asbestos litigation, are offered protection by the legislation.

Curiously, manufacturer third parties, such as Manville, and other asbestos manufacturing companies, are not offered the same protection. This will only perpetuate the unfair and inequitable process by which asbestos claims are currently adjudicated. The maker of the product would pay the compensation, yet, would continue to be stuck in the morass of litigation, while those who controlled the use of the product would be provided immunity.

H.R. 3090 excludes workers covered by FECA and Longshore and Harbor Workers. To us it does not appear logical to carve out this class of workers for separate treatment. The impact of such a provision on asbestos-related cases, for example, would be to exclude from coverage somewhere between 50 and perhaps 80 percent of those who are currently filing tort suits against asbestos manufacturers.

Nor does the bill provide for contribution by the Federal Government which was responsible for exposing the largest number of injured workers during the World War II and Korean war shipbuilding periods.

The cost allocation formula of H.R. 3090 is complex. The current language increases uncertainty amongst the various parties and limits their and their insurers' ability to calculate potential liability. The section should be rewritten to apportion the obligation to provide insurance premiums as called for in the bill equally between employers and toxic substance market participants. A more simple formula such as that developed in the Wellington Group discussions should be adopted.

Eligibility for compensation under H.R. 3090 is not clearly stated. At some points in the bill the term disability is used, whereas at other points, impairment is used; and they seem to be used interchangeably even though those terms bespeak different concepts. The legislative language should be at least clarified in this regard so that only those who are suffering disabilities related to asbestos exposure are eligible for compensation. This bill or any other must, without equivocation, provide compensation for physical impairments which cause some degree of disability and not simply for having been exposed to asbestos.

Mr. Chairman, representatives of the Manville Corporation have recently had the opportunity to study the actual operations of the Asbestos Claims Facility which resulted from the Wellington Group discussions. We are impressed by those operations and encouraged with the prospect of that private facility being able to satisfy a large share of the claims now pending and expected. Manville fully supports that effort and hopes eventually to obtain bankruptcy court approval to participate in that facility.

But it is outside the power of private industry to force this Government to accept its just responsibility for the injuries which it caused. At a very minimum, the Federal Government should, in fairness to its citizens, legislate a compensation program for people injured by asbestos exposure in workplaces controlled by the Government. If the Government does no more than accept its just responsibility for compensating shipyard workers, then private industry, through the Asbestos Claim Facility, can, and will, handle the rest of the claims.

As it now stands, the judicial system of America has imposed upon private industry the cost of compensating injuries caused by the Government. That same Government which invokes the power of a sovereign to escape the consequences of its wrongful acts.

The motto of our judicial system—equal justice under the law—seemingly does not apply when it comes to the Government actually paying for its own negligence. Private industry cannot, and should not, be asked to pay the Government's share of this problem.

The asbestos crisis is upon us. It is here and now. It is large. It is a twin tragedy, affecting thousands of families and the entire court system. It requires Federal legislation to resolve the tragedy fairly and fully, and to assure that the monies that Manville and others are prepared to commit are spent wisely.

Whatever other occupational disease issues require attention, should not be permitted to delay movement in this one area where all observers agree that Congress must act.

Thank you, Mr. Chairman.

[The prepared statement G. Earl Parker follows:]

PREPARED STATEMENT OF G. EARL PARKER, SENIOR VICE PRESIDENT, LAW AND PUBLIC AFFAIRS, MANVILLE CORP., SEPTEMBER 26, 1985

Good morning, Mr. Chairman. My name is Earl Parker, and I am Senior Vice President, Law and Public Affairs, and a member of the Board of Directors, of the Manville Corporation. Manville is a diversified international manufacturing and natural resources supplier with primary businesses in insulation, forest products, roofing and mining. Previously, the company was a lender in the manufacture and sale of asbestos-containing products. The estimatable contingent liability resulting from the sale of asbestos-containing products led to our filing of Chapter 11 Reorganization petitions in August, 1982.

Mr. Chairman, Manville Chairman of the Board, John McKinney, and I have testifed before various committes of the Congress numerous times over the past ten years as we sought to focus Congressional attention on the asbestos-disease tragedy and the legislative actions we believe are necessary to cope with this very real problem. I think our views are now widely known, and I will not repeat them at length this morning. Let me briefly summarize our position.

First, we acknowledge that overexposure to asbestos can indeed cause debilitating, sometimes fatal, disease; that tens of thousands of people have received sufficient exposure to asbestos, almost exclusively in connection with their employment, to experience impairment or disability; and that all those involved in the manfacture, sale, and use of friable asbestos products must recognize necessity to fashion a realistic means to compensate those workers actually injured by exposure to asbestos products.

Second, while third-party manufacturers accept a responsibility to establish a system to compensate those injured by their products, it is indisputable that, in the case of asbestos, the courses we have followed to date have been the wrong ones to achieve this simple goal. As the RAND Corporation's Institute for Civil Justice has reported, while over $1 billion was spent during the first ten years of asbestos personal injury litigation, only $236 million, or 23 percent of the total spent, actually reached the injured parties for whom it was intended.

Third, it is clear that continued reliance on tort litigation as the means for determining manufacturers' responsibilities to asbestos claimants threatens the private sector's contribution to the compensation of future claimants—those who, it is important to note, have already been exposed but, due to long-latency characteristics of the asbestos diseases, have not yet manifested injury. The evolution of novel theories of liability, assessment of substantial awards for both speculative and punitive damages, the eruption of coverage disputes with our insurance carriers, and the failure of one of the major culpabie parties—the federal government—to accept its share of the responsibility in the asbestos tragedy all interact to make this complex litigation even less fair and less manageable.

For these reasons, Mr. Chairman, we are convinced that an alternative to the morass of tort litigation is essential and is a matter of pure common sense. Indeed, it is only through a non-adversarial mechanism that we may focus our collective attention on the real issue: offering fair compensation to each and every person actually injured by asbestos, both now and in the future.

Representatives of Manville Corporation have very recently had the opportunity to study the actual operations of the asbestos claims facility which resulted from the Wellington Group discussions. We are impressed by those operations and encouraged with the prospects of that private facility being able to satisfy a large share of the claims now pending and expected. Manville fully supports that effort and hopes eventually to obtain bankruptcy court approval to participate in that facility.

But is is outside the power of private industry to force this government to accept its just responsibility for the injuries which it caused. At a very minimum, this government should in fairness to its citizens, legislate a compensation program for people injured by asbestos exposure in workplaces controlled by the government. If the government does no more than accept its just responsibility for compensating shipyard workers, then private industry through the asbestos claims facility can and will handle the rest of the claims. As it now stands, the judicial system of America has imposed upon private industry the cost of compensating injuries caused by the government. That same government which invokes the powers of a sovereign to escape the consequences of its wrongful acts. The motto of our judicial system, "equal justice under the law" seemingly does not apply when it comes to the government actually paying for its negligence. Private industry cannot and should not be asked to pay the government's share as well.

It is important to recognize, Mr. Chairman, that the asbestos "crisis" derives primarily from the tort litigation that the tragedy has spawned. With a reported 30,000 asbestos lawsuits now pending in state and federal courts throughout the nation, and with new lawsuits continuing to be filled at a rate of at least 6,000 per year, the resulting burden upon existing legal institutions is obvious. While this massive influx of tort claims threatens to swamp the entire judicial system, the impact of asbestos claims on existing state and federal workers' compensation systems appears to be negligible: according to testimony given June 11 before this Subcommittee, all occupational disease claims combined make up only one percent (1%) of current workers' compensation claims.

In short, it appears that workers are not relying on workers' compensation as a traditional remedy for asbestos-related occupational injuries. Instead, they seem to file and rely principally on tort lawsuits against companies such as mine, the third-party manufacturers. Undoubtedly, subrogation rights, limits on attorneys fees, and benefits based upon objective criteria all contribute to this phenomenon. This phenomenon cannot be explained by criticizing eligibility criteria or benefit levels in workers' compensation; even under statutes fully responsive to the occupational disease claimant, such as FECA or the Longshore Act, relatively few administrative claims are filed. It was our potential tort liability—not any liability we may owe under workers' compensation—that compelled Manville to seek an alternative means of evaluating claims through its reorganization proceedings. And as the Subcommittee is probably aware from recent press reports, Manville has made substantial progress in attempting to quantify its financial commitment to asbestos health claimants. We have announced a tentative agreement with Leon Silverman, the court-appointed representative of future claimants on the principle elements of a Plan of Reorganization in our Chapter 11 proceedings. Under the terms of that agreement, Manville has agreed to pay a large "start-up" sum to satisfy trade and commercial creditors, existing and short-term projected asbestos claims, and any other validated claims, and thereafter to pay up to $75 million per year for as long as a quarter of a century to satisfy bona fide asbestos disease claims. On top of that, we have pledged up to 20% of any profits earned over and above these amounts. And, essentially as security against our performance under this Plan, we have agreed to turn over 50% of Manville's stock now—with the possibility that this percentage could increase to 80% if needed to pay claims—to the independent trustees who will henceforth handle asbestos claims against Manville. In short, we have committed virtually the entire resources of the Manville Corporation, if needed, to meet our responsibilities to asbestos claimants.

Mr. Chairman, there simply isn't any more to be had from us. The proposed Plan extracts all that we can possibly contribute, while still maintaining the corporation as a viable entity generating further earnings that, if needed, could be made available to deserving asbestos claimants. In 1984, for example, Manville earned $77 million. Had the tentative Chapter 11 agreement been in effect then, you can readily see that we have left very little margin for investment or improvement in the company's businesses.

From our perspective, then, the issue confronting the Subcommittee is very simple. Our financial commitment to victims is being fixed by the Chapter 11 Plan at the maximum amount possible. The remaining, important, question is whether our obligation to these claimants will be met through existing systems, or a system designed by the Bankruptcy Court and applicable only to Manville, or whether Congress will legislate a new, more rational, system for compensating asbestos victims—one that codifies our financial commitment and focuses on a fair and efficient means of delivering these dollars.

Stated bluntly, the choice you face is to legislate a solution, or to see the limited funds available from the private sector squandered on legal fees and other transaction costs. If you FAIL to act, then you are endorsing a system that will award damages to present claimants at the expense of future claimants; that rewards plaintiffs who have no existing impairment or disability at the expenses of our ability to compensate the truly injured; and that rewards attorneys at the expense of all claimants.

If, on the other hand, you DO legislate, then you are acting to assure that similarly injured workers can be fairly compensated in a similar fashion; that compensation will be paid only to those who, based upon medical evidence, are disabled (while protecting the rights of all others to seek compensation if they become disabled in the future); and that maximum benefits with regard to both present and future claimants will be paid to those with maximum injuries.

Against this backdrop, we are encouraged that Congress has shown increasing interest in considering a legislative solution to the asbestos issue. Manville has previously testified to its support of legislation in this area generally, and we have indicated our support of H.R. 1626, Chairman Murphy's Asbestos Workers Recovery Act, in particular. But the subject of today's hearings is H.R. 3090, the Occupational Disease Compensation Act of 1985. How do we react to it?

Fundamentally, H.R. 3090 and H.R. 1626 each see different problems, and therefore each takes a different path to a solution. Where H.R. 3090 focuses on the employer-employee relationship and a perceivedc need to reform workers' compensation systems, H.R. 1626 focuses on the inequities of third-party lawsuits and therefore the need to address tort liability. Where H.R. 3090 seeks to address all occupational diseases in one fell swoop, H.R. 1626 addresses only the unique and known circumstances of the asbestos tragedy. And, where H.R. 3090 seeks to address all occupational disease problems prospectively, and hence continues third-party tort liability as one potential incentive for disease prevention, H.R. 1626 addresses a problem that is fundamental historical or retrospective in nature, and for which no "prevention" scenario is possible. We cannot retroactively protect those already exposed to asbestos, for whom the latency period has not yet run.

As for those workers still being exposd on naval vessels and in shipyards, or on construction sites, the "prevention" issue is turned on its head. The manufacturers who will become the third-party defendants in suits arising from these exposures no longer produce asbestos products and have no opportunity to prevent exposure on these sites. This responsibility lies with the U.S. Government and the private employers of exposed workers, both of which are exempt from tort liability under the present system.

So conceptually, H.R. 3090 in its present form does not, and apparently is not intended to solve the particular problem that Manville and the other asbestos litigation defendants face, i.e., unlimited third-party liability in an inefficient and unfair tort system. Consequently, H.R. 3090 does not address a myriad of issues that are central to the tort liability problem, including:

Dissimilar awards for identical injuries; no award at all where legal liability cannot be proven, even in the face of medical confirmation of asbestos injury; substantial awards to persons with purely speculative injuries such as cancerphobia; and, absolutely grotesque waste that is inherent in the asbestos litigation system, where defendants must necessarily pay lawyers to fight those claims that have no merit, and where plaintiffs must accept only sixty or seventy percent of the fair, or settlement, value of their claims, having of necessity paid their attorney a 30–40 percent or more contingent fee.

Mr. Chairman, it is evident to me that if the Subcommittee decides that the broader concerns which underlie H.R. 3090 are to be the focus of legislative consideration, then the asbestos issue must be resolved independently, either in a separate title to H.R. 3090 if it moves forward, or in completely separate legislation, such as H.R. 1626. In this manner, remedial legislation can be tailored to address the unique aspects of the asbestos problem, which are simply not addressed by H.R. 3090.

Moreover, we have serious reservations about our ability to survive if H.R. 3090 is enacted without separately and simultaneously addressing asbestos compensation issues. But that is only because the proposed legislation:

Excludes from coverage federal employees, as well as shipyard workers eligible under the Longshore Act; does not affect all asbestos tort lawsuits filed as of the date of the bill's enactment; and, permits asbestos tort lawsuits to continue in the future but does not require that a claim be filed under the proposed Act.

In essence, H.R. 3090 would continue unchanged the current haphazard and wasteful tort litigation system for asbestos victims. The bill would nonetheless define Manville as an "employer" and a "toxic substance market participant" required to make payments under the Act. To the extent that H.R. 3090 would impose these new financial obligations on Manville, but without a corresponding reduction in tort liability exposure, the company cannot afford it. In certain respects, H.R. 3090 conceivably could reduce the amount of Manville resources available to asbestos claimants by diverting funds from claimants to H.R. 3090's programs.

Mr. Chairman, I have several specific comments on provisions of H.R. 3090, but before addresssing those, I would like to focus briefly on the matter of cost. To have any hope of success, proposed legislation in the occupational disease area must be affordable. Yet by our analysis, the costs attendant to H.R. 3090 totally outstrip the ability of the private sector to fund the bill. Using conservative assumptions, we have made both a high and low range estimate of H.R. 3090's costs. Under the low range estimate, the cost of asbestos claims paid under H.R. 3090 through the year 2002 would be $7,279,430,867, of which my company's approximate share would be $2,424,050,479, or an annualized cost of $80,801,683 over the period of time for which the benefits would be paid. These figures are based upon projections of Dr. Alex Walker, a noted epidemiologist, of Epidemiological Resources, Inc. of the number of tort claims anticipated between 1982 and 2002, which would be covered by H.R. 3090. The important point here is that even the low range estimate, Manville's obligation under H.R. 3090 exceeds its Chapter 11 plan commitment, which represents the maximum amount we can afford to pay.

By contrast, using Dr. Walker's high estimate of possible tort claims, the total cost would be $24,291,680,234, with my company's share being approximately

$8,016,254,477 or an annualized cost over the period when benefits would be paid of $267,208,483. And, Mr. Chairman, I would add that other medical investigators such as Dr. Selikoff, have estimated an even greater number of claims which could easily double these cost projections.

Mr. Chairman, it must be emphasized that these cost projections do not include claims arising out of shipyards as those workers are covered by either the Federal Employees Compensation Act or the Longshoremen and Harbor Workers Compensation Act and are excluded from H.R. 3090. Claims arising from the shipyards represent approximately 50% of the present asbestos disease claims filed and that number is expected to rise in the future. Accordingly, benefits paid under H.R. 3090 address, at most, only half the problem. Further, it is worth repeating that H.R. 3090 does not cover pending lawsuits, which in the case of my company involves 17,100 claims.

I would be happy to provide the Subcommittee with additional information on these cost estimates. Suffice it to say, that using extremely conservative assumptions the cost of H.R. 3090 totally outstrips the combined resources of the private sector being called upon to fund the bill.

Assuming that H.R. 3090 would somehow be affordable for Manville and others in the private sector, there are other conceptual problems with the proposal that merit close scrutiny and refinement by the Subcommittee. While we would be happy to provide the Subcommittee with detailed written comments on each of these areas, in the interest of brevity let me only summarize them quickly.

Exclusivity for employers, but NOT for third-parties: Section 4

Section 4(a) makes the compensation under the proposed Act an employee's exclusive remedy against a long list of entities—the employer; the employer's insurer; employees or agents of the employer; and officers and directors of the employer. Even collective bargaining agents—who themselves are often sued in the asbestos litigation—are offered protection by the legislation. By contrast, manufacturer third-parties, such as Manville or other asbestos litigation defendants, are not offered the same protection. This would only perpetuate the unfair and inequitable process by which asbestos claims are currently adjudicated. For a historical problem such as asbestos, the comprehensive exclusivity approach taken in H.R. 1626 is necessary.

Exclusion of workers covered by FECA and LSHWA: Section 4(e)

H.R. 3090 does not apply to anyone eligible for compensation under the Federal Employees Compensation Act or the Longshoreman and Harbor Workers Compensation Act. The impact of such a provision on asbestos-related cases. for example, would be to exclude from coverage somewhere between fifty and eighty percent of those currently filing tort suits against asbestos manufacturers.

Government contribution: Section 3 and section 10(d)(3) (B) and (C)

The definitions of "employer" and "toxic substance market participant" should each explicitly include the federal government. In allocating costs in Section 10(d)(3), the premiums payable should account for the extent of government participation in the creation of the problem. The full rationale for accounting for government responsibility in the asbestos tragedy is explored in the statement for the record that I submitted to the Subcommittee in regards to its June 25, 1985, hearing. It is important to note in this regard that government contribution does not affect the extent of Manville's commitment to compensate injured workers; it only impacts on the total amount available to compensate claimants.

Cost allocation among private parties: Section 10(d)(3)

The language increases uncertainty among the various parties and limits their ability to calculate their potential liability under the Act. The Act should apportion the obligation to provide insurance premiums as called for in the bill equally as between employers and toxic substance market participants. Toxic substance market participants should allocate their responsibilities amongst themselves according to their real-world asbestos litigation experience, patterned after the Wellington Agreement formula.

Eligibility for compensation: Section 5

Section 5(a) indicates that compensation is payable for "disability." At other points in this section, the term "disability" and the term "impairment" are used almost interchangeably, although the two words have quite different meanings. The legislative language should be clarified in this regard, and the legislation should state explicitly that persons who do not evidence "disability" or "impairment" are not entitled to recovery unless and until they meet those tests.

Mr. Chairman, we view proposals such as H.R. 3090 against the backdrop of our extensive experience in litigating third-party personal injury claims alleging asbestos-related injury. As such, it is worth repeating that the advocates of H.R. 3090 are attempting to address a quite different set of concerns. In that sense, we recognize that the criteria which we believe are important to a resolution of the asbestos problem may not be appropriate in other instances, where the issues are largely prospective, and possibly even speculative, in nature.

The asbestos crisis is upon us, here and now. It requires federal legislation to resolve the tragedy fairly and fully, and to assure that the monies that Manville and others are prepared to commit are expended wisely. Even if other occupational disease issues require Congressional attention sometime in the future, they should not be permitted to delay movement in this one area where the crisis already exists.

Mr. MURPHY. Thank you very much, Mr. Parker.

I think you answered the one question I had which was why do you think asbestos is unique compared to the other occupational diseases and why it should be treated separately.

I take it that you believe that it should because of the Government's responsibility in a number of the claims. Is that your underlying instance?

Mr. PARKER. That would certainly be the first part of my answer, Mr. Chairman. The Government certainly has been responsible for causing a great number of the asbestos injuries that private industry is now footing the bill for.

The other part of the answer, I think, is that it is unique because it is really a historic disease situation. As I mentioned, the exposures have taken place in the past, and although we have injuries and disease now being manifested, there is little that can be done in the preventive area. So I think it is time for us to step back from the situation and look at the large number of people who need compensation on the other hand. The companies that have money and are willing to pay——

Mr. MURPHY. Why is it more historic than, say, red lung or some other type of industrial disease?

Mr. PARKER. Let's take black lung for a bad example of many things. Coal is still being mined and still there are a large number of people who are operating in the coal industry, and there are injurious exposures which, unfortunately, are still taking place in that industry.

Red lung, I think, has the same application. But asbestos has largely been discontinued in the manufacturing operations in so far as the dusty products are concerned.

Mr. MURPHY. So we are facing a finite number of claims, there are only so many out there who can be affected and there shouldn't be any more?

Mr. PARKER. That's my understanding.

There is one area of demolition and removal of asbestos but regulations are now in place which control dust conditions and those operations.

Mr. MURPHY. Would H.R. 3090 be more acceptable to you if a requirement that workers file a claim under the act—if we had them file their claims under the act and have it considered under the act?

Mr. PARKER. That would be an improvement in H.R. 3090, sir. I don't think the bill as it now stands addresses large parts of the problem, such as the now pending claims which would not be required to file under the act, and such as those claims where entitlement under Federal compensation programs exists. I think whatever bill comes out of Congress should address the entire problem and wind it up so that we do make a stab at solving the litigation problem which I referred to in my remarks.

Mr. **Murphy**. Thank you, Mr. Parker.

Mr. **Parker**. Thank you, Mr. Chairman.

Mr. **Murphy**. Mr. Williams.

Mr. **Williams**. Thank you, Mr. Chairman. And thank you, Mr. Parker, for your good counsel here today.

We are in considerable agreement, third-party manufacturers have accepted, as you state, a responsibility for compensation, and the current system isn't working very well, changes need to be made. While we may not agree precisely on what those changes should be, I think we are reasonably close.

Can you provide the subcommittee either now or at a later time with the methodology you used for determining the costs of the legislation?

Mr. **Parker**. Yes, I have that here and I will be hapy to leave it with your staff.

[The information follows:]

LOW ESTIMATE

Number of claims:	
Manville employee workers comp claims	1,600
Walker—total number of claims	35,773
Worker's comp reduced by 7% (duplicates)	1,488
Walker reduced by 50% (FECA & Longshore)	17,886
Total claims	19,374
Conclusions:	
Total payment	$7,279,430,867
Manville's share (assume 33%)	2,424,050,479
Annualized over 30 years	80,801,683

ANALYSIS

1. 19,374 claims: 75% Construction = 14,531; 25% Manufacturing = 4,843.

2. Assume 36% total disability (see Assumptions, numbers 7 and 15).

Construction—5,231 claims × $576,295 = $3,014,599,145; Manufacturing—1,743 claims × $481,354 = $839,000,022.

3. Partial Disability—Assume 20 years of 25% partial disability and 10 years of death benefits.

Construction—9,300 partial disability claims: 20 years: (19,209.84 × .25) × 9,300 = $893,218,500; 10 years: 192,098.40 × 9,300 = $1,786,515,120.

Manufacturing—3,100 partial disability claims: 20 years: (16,045.12 × .25) × 20 × 3,100 = $248,699,360; 10 years: 160,451.2 × 3,100 = $497,398,720.

HIGH ESTIMATE

Number of claims:	
Manville employee workers comp claims	5,000
Total number of claims	120,000
Worker's comp reduced by 7% (duplicates)	4,650
120,000 reduced by 50% (FECA & Longshore)	60,000
Total claims	64,650
Conclusions:	
Total payment	$24,291,680,234
Manville's share (assume 33%)	8,016,254,477
Annualized over 30 years	67,208,483

ANALYSIS

1. 64,650 claims: 75% Construction=48,488; 25% Manufacturing=16,162.

2. Assume 36% total disability (see Assumptions, numbers 7 and 15).

Construction—17,456 claims×$576,295=$10,059,805,520; Manufacturing—5,818 claims×$481,354=$2,800,517,572.

3. Partial Disability—Assume 20 years of 25% partial disability and 10 years of death benefits.

Construction—31,032 partial disability claims: 20 years: (19,209.84×.25)×20 ×31,032=$2,980,598,774; 10 years: 192,098.40×31,032=$5,961,197=549.

Manufacturing—10,344 partial disability claims: 20 years: (16,045.12×.25)×20 ×10,344=$829,853,606; 10 years: 160,451.2×10,344=$1,659,707,213.

ASSUMPTIONS FOR CALCULATIONS

1. Average weekly wages are derived from Department of Labor, Bureau of Labor Statistic's information.

	Hourly wage	Hours per week	Weekly wage
a. Seasonally adjusted wage information:			
Construction	$12.23	37.2	$454.96
Manufacturing	9.51	40.4	380.40
b. Unadjusted:			
Construction	12.12	38.1	461.77
Manufacturing	9.50	40.6	385.70

From this information 80% of the unadjusted weekly wage for the construction industry is $369.42; 80% of the unadjusted weekly wage for the manufacturing industry is $308.56.

Note.—Bureau of Labor Statistics information is based upon information received as of July 12, 1985.

2. Assume that total disability would not begin until age 55. Life expectancy of a 55 year old man is 21.4 years for white, 18.7 years for black, 19.7 years for all others. Life expectancy used for these calculations is 20 years.

3. Assume the wife of a 55 year old man is 50 years old. Life expectancy of a 50 year old woman is 31.2 years for white, 27.8 years for black, 28.9 years for all others. Accordingly, a term of 30 years was used as the number of years over which benefits would be paid.

4. Assume that 75% of J-M's claimants are in the construction industry and 25% is in the manufacturing industry.

5. Construction: $369.42×52 weeks/year=$19,209.84/year×30 years=$576,295.20.

Manufacturing: $308.56×52 weeks/year=$16,045.12/year×30 years=$481,353.60.

6. Assume partial disability is 25% disabled.

7. Assume 15% of the asbestosis cases are total disability claims, and all mesothelioma and lung cancer cases are total disability claims.

8. Assume (based upon current statistics) that approximately 50% of all claims are eligible for FECA or Longshoreman's benefits; and, therefore, would not be paid by Manville under this bill.

9. There is no cost of living increase included. It is not discounted to present value.

10. Since government/shipyard cases are excluded, figures are at best half the true picture.

11. The low figure excludes minimal asbestois claims.

12. This excludes all cases pending, approximately 17,100, which Manville must still pay. It also excludes claims in tort which can still be filed under this legislation.

13. The number of claims includes only lung cancer. To the extent there are other cancers causally related to asbestos, they are covered by the bill, but are not included in the number of claims. Accordingly, the number of cancer claims is artifically low.

14. There remains considerable uncertainty and debate within the medical/scientific community as to the causal role, if any, of asbestos and the numerous types of lung cancer. Debate and discussion continues in the American Cancer Society, the

American Thoracic Society, the National Cancer Institute of the National Institutes of Health, the American Lung Society, amongst others.

15. Manville's worker's compensation experience reflects a somewhat smaller percentage of total disability than the Walker figures.

Mr. WILIAMS. The low estimate cost that you have given us is close to the arrangement that your company has made with the bankruptcy court, is that accurate?

Mr. PARKER. The dollar figure of $80 million is close, sir, but H.R. 3090 addresses, as I said, only about half of the problem. It seems to exclude those who were injured in Federal employment.

Mr. WILLIAMS. You are also concerned with the lack of third-party protection. Do you believe that the dollar-for-dollar subtraction from the tort claims will not be affected?

Mr. PARKER. I think we have the same sort of situation that we now face with subrogation liens under the State and Federal workers compensation programs. For some reason, individual claimants seem to eschew State workers compensation because of a feared impact upon their subsequent tort litigation claims, or for some other reason. We find a relatively small percentage of claimants who have filed tort litigation have also filed State workers compensation. While there would be a stronger attraction under H.R. 3090 for people to file for that compensation because it is at a higher level, I still think that there would be some hesitancy on the part of many people to use that system rather than continuing tort litigation.

Mr. PULLEN. If I could add to that, Mr. Williams.

One of the problems with the litigation, of course, is that substantial numbers of persons in the tort system can receive an award even though they have no present disability or injury. To the degree that we have to bear the costs of compensating people that are not yet evidencing physical impairment or disability, that only detracts from our ability to compensate those who are.

So keeping us in the tort system really wouldn't address that problem and the need to take the finite resources that are available and direct them only to those that are in fact deserving.

Mr. WILLIAMS. What would you substitute in place of it?

Mr. PARKER. The pending bill, the Asbestos Workers Recovery Act, does build upon existing State workers compensation administrative systems to determine the existence of an asbestos-related disease. It provides the claimant with whatever compensation he is entitled to under that State system or under the applicable Federal system, and then provides an asbestos supplemental benefit above the workers compensation benefit. It would wipe out the employer's subrogation lien under workers compensation, which I think would be an overall improvement for that system.

So what we are trying to do is provide injured claimants with whatever they are entitled to under existing compensation programs, plus a supplemental benefit. And the current benefit, the benefit specified in H.R. 1626, is about $35,000, which is comparable to the take-home, after-expense benefit that people are receiving in tort litigation. That figure may certainly be adjusted as appropriate, but it does represent, I think, an increased benefit over the existing system.

Mr. WILLIAMS. Thank you.

Mr. **Murphy**. Mr. Bartlett, do you have any questions or comments?

Mr. **Bartlett**. Thank you, Mr. Chairman, I do have a couple of questions. I apologize for being late. As you all know, there's a full schedule today.

Mr. **Parker**. I was also late, Mr. Bartlett.

Mr. **Bartlett**. My question, I suppose, is, first of all, do you support the concept of the trigger for other occupational diseases if found, such as is proposed for asbestos, that is, presumption of——

Mr. **Parker**. I think other occupational diseases merit attention by this Congress. But I also think asbestos is better studied, known, and understood than any other occupational disease, and therefore merits separate attention in the immediate time frame. Certainly, not all occupational disease claims fit well into existing compensation programs which seem more attuned toward traumatic injuries such as loss of a limb or other types of industrial accidents.

The trigger and presumptions which are written into the bill H.R. 3090 give us some problem, particularly presumptions as to the relationship of lung cancer to asbestos exposure. Lung cancer, as you know, is still an elusive disease. There are many causes for it, primarily we think resulting from inhalation of tobacco smoke. I don't think it is appropriate at this time to presume that anyone with a lung cancer who has had some asbestos exposure derives his injuries from the asbestos exposure rather than other exposures, including tobacco.

Mr. **Bartlett**. One of the criticisms that I have heard of H.R. 1626, and we have discussed it before, is to compare it to the Black Lung bill or the virtually open ended compensation which Congress enacted, some say without really intending to, some years ago.

I wonder if you could respond to that? That is, you have testified that you are in favor of H.R. 1626 and that approach, while others have testified at previous hearings that the H.R. 1626 approach would lead to an open ended entitlement far more costly than the $150 million or so that we are discussing. They have said this is a quantum size difference, not just a little bit different, but in the billions of dollars.

How would you respond to that?

Mr. **Parker**. We have been very much aware of the deficiencies and criticisms of the black lung bill and have attempted to learn from those problems in promoting the current proposal. There are a number of responses. First, asbestos-related diseases, as I mentioned, are historic, the exposure has largely come to an end. Whereas, black lung, there is an active coal mining industry—there are additional workers being exposed every day.

Black lung, unfortunately, has presumptions of disease based largely upon years of experience in the industry. And unlike the black lung legislation, the proposed Asbestos Workers Recovery Act does provide for objective medical determination of the existence of disease—determinations based upon x-ray examination and two standard pulmonary function tests.

I think those are the lessons that we have learned from black lung and have attempted to incorporate in the proposed legislation.

Mr. **Bartlett**. One other question, and I posed this to you before. I want to pose it again and see if you have a chance to really——

BEST COPY AVAILABLE

Mr. Parker. May I just add to my previous answer?

The pending bill also does provide for a cap on the government's contribution to the Asbestos Workers Recovery Act and that cap is a maximum of $150 million. The industry's contribution for the first two years would be also $150 million. But after that it would be experience-rated. The industry contribution is essentially uncapped, whereas, the Government's bill would never exceed $150 million per year.

Mr. Bartlett. The critics of H.R. 1626 and I don't necessarily agree with them—but in watching the vaguaries of Congress, sometimes it does make some sense—they predict that at some point in the future, a future Congress could be prevailed upon by the industry to uncap that $150 million contribution.

How could we avoid such a situation?

Mr. Parker. I think we must trust the wisdom and judgement of such Congresses in the future, Mr. Bartlett?

Mr. Bartlett. Do you have any other, or any better ways than that? Any other more comforting suggestion? [Laughter.]

Mr. Parker. No, sir, I am afraid not.

Mr. Bartlett. You support then, a very clear and explicit cap in which the statute would state that it is the intent of Congress that this is the cap and this is all there is? That's your testimony?

Mr. Parker. I support a concept that the Government should pay its just share of the compensation and I support the bill which now does have a cap on the Government's contribution of $150 million per year. There may be some inconsistency in that, and the inconsistency would be in the political realities of addressing the black lung concerns that many Congressmen justifiably hold. So we are trying to get significant, reasonable compensation from the government, but we are trying to address those concerns as to excessive black lung type of expenses.

Mr. Bartlett. Well, it would be——

Mr. Pullen. Mr. Bartlett, if I could.

I think the key to us, as Mr. Parker stated, is simply not to perpetuate a system that requires us to bear the cost for exposures within the control of the Government that ultimately harm workers. That's the bottom line.

Mr. Bartlett. First, let me say, as I have told you in the past, that I think that the worst thing that we can do is what we have done over the last several years, and that is nothing at all. I think the result of that is the reimbursements that are made go to the system as opposed to the persons who in fact were injured.

Mr. Parker. I certainly agree with you on that, sir.

Mr. Bartlett. So I think it is incumbent on Congress to do something. There seem to be about six different "somethings" that are being proposed in almost a hard line position and this is all we can do and no more—it would seem to me that it would substantially strengthen the process in terms of trying to come up with a bill. If we could, in either the context of H.R. 1626 or H.R. 3090, or some other bill, if we could in fact firmly establish that we are going to legislatively decree that a $150 million cap is the cap and not leave the second shoe ready to fall, that is, an amount to be defined later. It seems to me that if we could only take the first half of what you said and not the second half—I wouldn't want to say that, therefore, Congress would rush forward a bill—it may not break the logjam but it may at least cause some water to flow over it.

Mr. PARKER. Mr. Bartlett, I certainly intended to indicate that we do support that cap. To me it doesn't follow entirely in logic and right and justice, but I think——

Mr. BARTLETT. I didn't suggest it did. I think we might get a bill through.

Mr. PARKER. As a practical matter it might get a bill through and we support it for that reason.

Mr. BARTLETT. Thank you, Mr. Chairman.

Mr. MURPHY. Thank you, Mr. Bartlett.

Might I ask, if the Government participated in the Wellington procedure to the extent of the Government's cap contribution, would that work, instead of our addressing a whole compensation legislation?

Mr. PARKER. I think it is entirely possible, sir, that the Congress could legislate such a contribution to that system in lieu of its liabilities. And as you know, the Federal Government is being sued in about 14,000 cases. Yes, I think that could be worked out, sir.

Mr. MURPHY. Are you convinced that system is now removing a sufficient number of cases from the courtroom and that if the Government participated to some extent—whichever extent we could get the Appropriations Committee to agree to, through the Labor Department, through FECA, and Appropriations specifically, for the Government to participate in the Wellington solution, would that be a suitable and logical approach and would that answer then any further necessity of addressing legislation to the asbestos problem?

Mr. PARKER. I think it would form the basis for a solution, sir, and I would certainly want to study that and continue to work on it with your staff. My impression is that that is an innovative suggestion which certainly merits being explored fully.

Mr. MURPHY. I think we may explore that, too. If we believe that it will solve the problem, then we are really not affecting the rights of any workers, we are not drafting totally new legislation. We would seek authorizing legislation merely to direct the funds to be used in that manner. It may be a swifter approach than the one we are taking.

Mr. PARKER. That is a very attractive suggestion, sir. I would like to pursue that with you.

Mr. MURPHY. Fine, thank you very much. Thank you very much, gentlemen.

Mr. PARKER. Thank you.

Mr. MURPHY. The next witnesses are representing the U.S. Chamber of Commerce, Dr. Harvey Alter and Mr. Samuel A. Roth. Gentlemen, you may proceed.

STATEMENTS OF HARVEY ALTER, MANAGER, RESOURCES POLICY DEPARTMENT, U.S. CHAMBER OF COMMERCE, AND SAMUEL A. ROTH, ASSOCIATE MANAGER, EMPLOYEE RELATIONS, U.S. CHAMBER OF COMMERCE

Mr. ROTH. Good morning, Chairman Murphy. Before I proceed, I wanted to mention if we could have the entire statement included in the hearing record?

Mr. MURPHY. Without objection, your entire statement will be included into the record and we will appreciate your summaries.

Mr. ROTH. I am Samuel Roth. I am Associate Manager of Employee Relations at the U.S. Chamber and Staff Director of our Council on Workers' Compensation, and I edit our annual publication Analysis of Workers' Compensation Laws, copies of which have been furnished to members of this committee.

We welcome the opportunity to appear on behalf of the chamber to express our views on H.R. 3090, the Occupational Disease Compensation Act of 1985.

We have long supported provision of adequate and equitable compensation for occupationally caused disability through a sound State workers' compensation system. We also support an equitable product liability tort system for the protection of the public.

We have testified before this subcommittee on more than one occasion on the progress in modernizing State occupational disease coverage, on eliminating the so-called barriers to compensation, and on systemic problems in State worker's compensation vis-a-vis tort liability. We have also applauded the efforts by the erection and actually working Wellington Facility, as well as the recent announcement by the Manville Corp. to seek establishment of a separate trust fund for payment of these claims. And also have been critical of the Federal track record to date in the administration of Federal workers' compensation programs.

Rather than read those remarks again, I would just like to read our remarks on the subject bill today and then turn it over to Dr. Alter to tell you about a recent study completed by the chamber.

Unlike some related bills, for example, H.R. 1626, the Asbestos Workers Recovery Act, which is designed to provide a solution to problems associated with a specific disease—asbestos—H.R. 3090, the Occupational Disease Compensation Act of 1985, would provide a mechanism through which all occupational disease deemed compensable could potentially be covered under a Federal program.

We oppose H.R. 3090 and the concepts on which it is based. Among its major provisions, H.R. 3090 would base benefit levels on national average weekly wages and include annual cost-of-living adjustments with no limit as to benefit duration, and provide liberalized eligibility criteria based in part solely on exposure to a toxic substance.

It would provide an automatic presumption for mesothelioma, asbestos, and lung cancer. And in the case of the latter, and in the absence of radiological and historical evidence, assure presumption solely by length of time on the job for certain workers without regard to patient history or habits.

It would liberalize claim filings procedures. It would create a massive new Federal bureaucracy to administer this program, set

BEST COPY AVAILABLE

up insurance rates in a monopolistic insurance fund, and "designate" employers to be covered on a compulsory basis.

It would make suspension of payments difficult, if not impossible. It would create a special risk assessment panel to conduct additional research and education, promulgate additional standards, and erect additional surveillance programs. It would require the addition of other occupational diseases within the program's coverage by the panel, needing only to find enough of an equivalent exposure relationship to justify "conclusive presumption."

Finally, the bill would define "sufficient exposure" as "at least a 30-percent increase in the risk of developing a disease arising from such exposure."

Mr. Chairman, few issues cause our membership as much concern, particularly smaller firms, as to federalization of State workers' compensation laws in whole or in part. We foresee extreme pressure on States to conform their statutes to this Federal statute. The track record to date of Federal administration of workers' compensation programs is poor at best. The ultimate effects of any federalization, however implemented, are profound.

Finally, there is absolutely no justification for removing from the States the right to determine what is best for workers, employers, and insurers in each State.

While I won't endeavor to analyze H.R. 3090 line by line, let me just give you what we perceive to be the primary defects of the proposal. First, it is biased against work. It focuses on raising benefits with the objective of improving a lot of injured workers, but is a disincentive for workers to return to work. That overemphasizes the cash recovery aspect of workers' compensation. It is a very serious departure from the historic principle that workers' compensation should be geared to promote the earliest possible recovery and return to work, and a productive place in society.

The bill is incomplete. It mandates huge benefit increases without adjusting the much more troublesome aspects of workers' compensation such as deficiencies in delivery systems, and permanent partial awards, and so forth.

As a result, the chance for meaningful reforms at the State level which are occurring are thwarted because no basis is left for achieving a political compromise. The bill is costly. It promises to be an exceedingly costly proposal because it implicitly promises to make workers' compensation into a compensation health care and income maintenance program for all private sector employees irrespective of the cause or source of their disability.

Based on the cost increases resulting from other Federal work compensation programs, for example, black lung, a fivefold increase in the cost for most employers is foreseeable. It is litigious. Briefly, it offers the potential triple recovery for workers if you exercise a third option held open which is third-party litigation. It encourages forum shopping.

Finally, it's bureaucratic. There's a serious question as to whether the Benefit Review Board and Office of Workers' Compensation Programs would be able to cope with the added responsibilities assigned to them. These agencies are criticized for their failure to cope with their present workloads. And the additional paper work incurred would definitely be passed on to the public in the form of higher prices, which is a further inflationary pressure.

As I said, federalization is one thing that we are very concerned about. With the pressures on the States to conform, it substitutes the judgment of far-removed Federal regulators for the expertise of the State administrators. Benefits could be inflated by a single stroke of the pen here in Washington.

The second phase of federalization is the inevitable Federal takeover of the entire system.

Finally, it's a gamble on the unknown. It asks the business community, workers, and the American public to buy, sight unseen, an untested dualized workers' compensation system. As explained, such a system would be fraught with problems, many of which no doubt are not yet anticipated. The Federal experience with workers' compensation heightens the uncertainty over what may occur in the future.

At this point, I will turn it over to Dr. Alter.

STATEMENT OF HARVEY ALTER

Mr. ALTER. Thank you, Mr. Chairman.

I had the privilege of testifying before you and your subcommittee before when we were able to talk about the expert panel the chambers drew together to address the broad issue of what we have called injury compensation and to tell you a bit about what they did. Since then, the report of that expert panel has been issued and a copy has been supplied to all Members of Congress, among many others.

It is a rather thick report. I don't want to go through the entire text but I think some of the findings and approaches of that expert group are germane to this morning's discussion.

The group examined the vast array of compensation mechanisms available to the American public. It is an array—it cannot be described truly as a system, but the conclusion they drew from this array of Federal, State, and private programs, and indeed, later on top of that, the court system, is that the programs appear to serve their intended purposes. Part of that judgment or conclusion, was that we set out looking to find, to identify, to count, those people who might have fallen through the sieve or the interstices of these safety net programs.

We could not count these people; we could not find them to count them, and I think that's a deficiency in methodology. I don't know of anybody that does have the right methodology. I don't think it's that people aren't there—it's just that they are not countable. But we could count the number of people who are not failing through. The exact number is questionable because some people get counted twice, national statistics do not permit unambiguous counting—but the numbers are vast, and we put in some tables in the report that tens and hundreds of millions of people in this country are presently covered by medical insurance and other safety nets. Just that fact alone raises the question of what else is needed?

That begs another section of the report, which is very much a subject of today's bill, and that is the broad rubric of causation. One part is disease; how is it brought about? As I read the medical literature, I find that there are very few diseases, very few cancers that are specifically caused by an individual agent. Indeed, as is well-known, asbestos is one of those very few. The International Agency for Research on Cancer [IARC] has identified a rather short list of things that they can say are proven carcinogens.

What confounds biology, chemistry, and medical science is the confounding of the disease itself by other factors—lifestyle has a lot to do with causation as does genetics.

So what our expert panel did was to set out not just an argument of good science, but how we think good science can be applied to determine causation. We think that is an essential feature of this report, that in fairness to all concerned, causation must be addressed.

Now understanding that, as I think we do, as I hope we do, we come to the conclusion that presumptions and triggers are not the way to go. Presumptions set aside science; presumptions superimpose a nonscientific, nonmedical judgment—it's almost going backward to the days of alchemy to have some of these presumptions, or to have some of these triggers because they cut off inquiry as to what may or may not be causation. And once the inquiry is cut off, what is also cut off is the ability to reach out and help those people who may be in need of help.

I commend to you not only the report for the conclusions, I commend to you the methods by which causation could be better approached, to bring closer together the law and the science, both of which are imperfect. And I commend to you the descriptions of the present extent of the compensation systems that we now have.

One thing about the present systems that we pointed out is that they are imperfect, that there are deficiencies. I wish we could have been the first to recognize them, this council and the business community could be the first to get on the soapbox and say these deficiencies must be corrected. We are not the first and the soapbox is crowded. Very many people have been saying this.

For example, we have worked intensely, and are continuing to work with our State chambers, and other chambers in our federation, to get reform at the State level where it's needed. The insurance industry has been a very loud voice in identifying these deficiences. And as I think as Mr. Roth's annual publication shows, these deficiencies are being corrected. We may all complain not fast enough, but they are being corrected, and we also look upon this as a dynamic process toward perfection.

If the subcommittee would like additional copies of the report or discuss its details, or its many citations, with us, we would be more than happy to do so.

Thank you.

[The prepared statement of Harvey Alter and Samuel A. Roth follows:]

LET'S REBUILD AMERICA
IN THE 80's

Statement of the Chamber of Commerce of the United States

ON: OCCUPATIONAL DISEASE COMPENSATION ACT OF 1985

TO: LABOR STANDARDS SUBCOMMITTEE OF THE HOUSE EDUCATION AND LABOR COMMITTEE

BY: HARVEY ALTER AND SAMUEL A. ROTH

DATE: SEPTEMBER 26, 1985

The Chamber's mission is to advance human progress through an economic,
political and social system based on individual freedom,
incentive, initiative, opportunity and responsibility.

The Chamber of Commerce of the United States is the world's largest federation of business companies and associations and is the principal spokesman for the American business community. It represents more than 184,000 companies plus several thousand other organizations, such as local/state chambers of commerce and trade/professional associations.

More than 92 percent of the Chamber's members are small business firms with fewer than 100 employees, 53 percent with fewer than 10 employees. Yet, virtually all of the nation's largest companies are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

Besides representing a cross section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business--manufacturing, retailing, services, construction, wholesaling, and finance--numbers more than 14,000 members. Yet no one group constitutes as much as 29 percent of the total membership. Further, the Chamber has substantial membership in all 50 states.

The Chamber's international reach is substantial as well. It believes that global interdependence provides an opportunity, not a threat. In addition to the 53 American Chambers of Commerce Abroad, an increasing number of members are engaged in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on national issues are developed by a cross section of its members serving on committees, subcommittees and task forces. Currently, some 1,800 business people participate in this process.

STATEMENT
on
OCCUPATIONAL DISEASE COMPENSATION ACT OF 1985
before the
LABOR STANDARDS SUBCOMMITTEE
of the
HOUSE EDUCATION AND LABOR COMMITTEE
for the
CHAMBER OF COMMERCE OF THE UNITED STATES
by
Harvey Alter and Samuel A. Roth
September 26, 1985

I am Dr. Harvey Alter, Manager of the Resources Policy Department of the U.S. Chamber of Commerce, and I served as staff coordinator for the Chamber's ad hoc National Business Council on Injury Compensation. I am a chemist by training.

Accompanying me is my colleague, Samuel A. Roth, Associate Manager, Employee Relations for the Chamber and staff executive of our Council on Workers' Compensation. Mr. Roth also edits the Chamber's annual publication Analysis of Workers' Compensation Laws, copies of which have been furnished to the members of the committee. We welcome the opportunity to appear on behalf of the Chamber to express our views on H. R. 3090, the Occupational Disease Compensation Act of 1985.

The Chamber has long supported provision of adequate and equitable compensation for occupationally caused disability through a sound state workers' compensation system. We also support an equitable product liability tort system for the protection of the public.

Summary of Chamber Position

Occupational disease, which H. R. 3090 attempts to address, is a serious societal problem, although there is considerable disagreement over its dimensions. Although rare, workers become ill and in some cases have died, as a result of their job. Our members, all of whom are employers, despair over any job-related illness. In those cases where workers are hurt on the job, our members want, in place, a fair, cost-effective workers' compensation system for injury, including disability which may arise out of and in the course of employment.

BEST COPY AVAILABLE

For some of our manufacturing members, product liability tort litigation resulting from workplace asbestos exposure has the catastrophic potential of bankruptcy. Others, who are insurers, face payments on policies based on premiums that did not anticipate present losses. Moreover, all elements of the business community are concerned that there not be any workplace exposure that could lead to health effects not recognized at present.

Occupational disease can be costly for workers and businesses alike. Thus, a fair system of compensation is needed. At present, workers' compensation and product liability are the two principal systems that compensate workers who develop occupational disease. However, their adequacy, equity, and efficiency have been sharply questioned.

Admittedly, both systems have flaws which need remedies, but we have reached the judgment that the compensation systems in place fairly well serve their intended purpose. At the same time, we are committed to making improvements in them. Moreover, we do not believe that any deficiencies in workers' compensation are responsible for product liability problems, and we question the need for changing the nature of the state compensation programs in response to the fact and perception of such problems. Furthermore, we strongly oppose federal programs designed to replace, supplant, or supplement state workers' compensation, a policy reaffirmed by the U.S. Chamber Board of Directors several times.

In recognition of the present awareness and state of understanding of long latency diseases, problems such as asbestos, as well as other potential product exposure problems, including those in the evironment, the Chamber recently has taken a significant step to seek and recommend new policies and proposals for dealing with exposure of workers and others to toxic or potentially toxic substances and any related disease or disability resulting therefrom. Modern times require modern approaches and that is what we believe we have accomplished through our ad hoc National Business Council on Injury Compensation. A description of the ad hoc Council and its recent report is contained in a later section of this statement. We also have provided copies of this report to each member of Congress.

The Present Myth of Personal Harm

The Chamber shares the concern of this Subcommittee and the public for any person who may suffer illness or disability as a result of exposure to toxic substances. Certainly, there is a public perception of a growing incidence of long-latency diseases from exposure to hazardous substances, brought about in large part by news media attention. This perception is contradicted by epidemiological data showing that the overall incidence of occupational diseases and of all cancers (except respiratory cancer) has held steady or declined since 1933. We do know that great strides have been made in the safe handling and management of substances that otherwise would pose threats to health and safety, and thus tragedies are being averted. Such accomplishments must be continued and expanded.

Moreover, the public's belief that causal relationships are well established between exposure to hazardous substances and long-latency diseases is not based in fact. Science and medicine have made clear linkages between substances and/or exposure and specific diseases in only a few isolated cases. For medical reasons, they are not likely to expand the list greatly in the near future.

Fortunately, several comprehensive studies are now under way to examine the scope of the problem of environmental exposure. The Chamber has contributed to one such study conducted by Universities Associated for Research and Education in Pathology.[1/] The results of this work will be supplemented by the investigation now being conducted for the Environmental Protection Agency by the Center for Disease Control. The several studies of environmental exposure completed so far do not support the perception, or hypothesis, that there is a linkage between environmental exposures and diseases, no doubt due to environmental controls.

It has been suggested that the sizeable number of product liability tort suits arising from workplace exposure to asbestos indicates that there is an epidemic of occupational disease. However, medical science has found

---

[1/] Health Aspects of the Disposal of Waste Chemicals. Universities Associated for Research and Education in Pathology, Inc. Bethesda, Maryland. 1985.

BEST COPY AVAILABLE

that even among this population not every claim is a *proven* case of impaired lung function or other specific illness caused by asbestos. In fact, many individuals who are diagnosed as having "asbestosis" actually have an asymptomatic condition which shows up on X-rays but is benign. It is the *fear* of asbestosis and asbestos-related cancer that is widespread.

Coupled with this fear are misunderstandings and erroneous "conventional wisdom." In testimony before the Senate Labor Subcommittee,[2] both Dr. Paul Wheeler of the Department of Radiology and Radiological Science of the Johns Hopkins Medical Institutions and Dr. Robert N. Jones of Tulane University School of Medicine, who testified on behalf of the American Lung Association and American Thoracic Society, questioned the general accuracy of the diagnoses of asbestos-related diseases. They believe that principles of medical diagnosis have been abrogated in the asbestos field and that various draft bills have not dealt adequately with medical criteria for the conditions to be compensated. Dr. Jones stated, "public policy in this area should be based on scientific information."

Although asbestos is one of 19 chemical substances or industrial processes proven carcinogenic,[3] there are still medical questions raised when consulting the primary cancer literature. Papers from the Sloan-Kettering Cancer Center introduce significant uncertainties about asbestos-related mesothelioma. Malignant mesothelioma is a rare disease with an incidence of 2.2 cases per million population per year.[4, 5]

2/ P.S. Wheeler, "Asbestos-Related Litigation: A Scientific Perspective and Solution," and R.N. Jones, "Public Responsibility in Asbestos-Related Diseases," before the Subcommittee on Labor, Senate Labor and Human Resources Committee, April 24, 1984.

3/ "Carcenogenic Risks. Strategies of Intervention." Report 25, World Health Organization, International Agency for Research on Cancer. Geneva. 1978.

4/ J. Brenner, P.P. Sordillo, G.B. Magill and R.B. Golbey. Malignant Peritoneal Mesothelioma - Review of 25 Patients. *Am. J. Gastroenterol.*, 1981, *75*: 311-13.

5/ Malignant Mesothelioma of the Pleura, Review of 123 Patients. *Cancer*, 1982, *49*:2431-5.

In a review of 123 patients diagnosed with malignant pleural mesothelioma, the largest series of patients from a single institution so far accumulated, the Sloan-Kettering researchers found that only 16 patients related a history of exposure to asbestos. Fourteen of the patients had a history of previous lung disease; one had received prior radiation to the chest; and 14 had been exposed to industrial dusts and chemicals.[6] This finding, that not all pleural mesotheliomas are related to asbestos, is consistent with a review of the literature stating that only from 10 to 70 percent of patients with malignant mesothelioma had been exposed to asbestos.[7]

The general conclusion appears to be that exposure to asbestos is an important etiologic factor but that other factors include serious lung disease, tuberculosis, chemical pneumonia, radiation or industrial dusts and chemicals other than asbestos.

The Sloan-Kettering team, in a review of malignant peritoneal mesothelioma, found no evidence of asbestos linkage.[8] They also reported that 20 percent of malignant mesotheliomas originate in the peritoneum.

The saddest aspect of this disease is that malignant mesothelioma is found in children. In a review of seven cases, the origin was at the pleura in six and one at the periotoneum. None of the patients related a history of exposure to asbestos.[9]

---

[6] Ibid.

[7] K.H. Antman. Malignant Mesothelioma. N. Engl. J. Med., 1980, 303:200-2.

[8] Brenner, Sordillo, Magill and Golbey. 311-13.

[9] J. Brenner, P.P. Sordillo and G. B. Magill. Malignant Mesothelioma in Children: Report of Seven Cases and Review of the Literature. Medical and Pediatric Oncology, 1981, 9:367-73.

This is not intended to be a comprehensive review of the literature but instead to raise questions about the conventional wisdom surrounding asbestos-related diseases. In the absence of definitive information about rare diseases, we should proceed carefully in the formulation of public policy. As noted in the citations, such public policy should be based on good science. Both compassion and caution are required.

Workers' Compensation For Job-Related Disability

As the record clearly demonstrates, workers' compensation -- a nearly 100-year old concept -- has proved to be a reasonably efficient method of protecting employers and their employees against the financial risks of job-caused disabilities, while motivating job-place safety and promoting the rehabilitation of injured workers.

It is premised on a quid pro quo. In exchange for certainty and promptness in receiving full medical care and a reasonable level of wage replacement for job-related injuries or diseases, even when they are at fault, workers give up the right to sue their employers for unlimited damages (the "exclusive remedy" doctrine). Employers give up the opportunity to reduce or avoid liability by proving that the employee was at fault but gain protection against unlimited liability. Both workers and employers escape the cost, uncertainty, and delay of litigation, and the public benefits from a reduced caseload in the welfare and judicial systems.

The workers' compensation system essentially consists of 56 separate programs. There is one for each state, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and American Samoa. There also are two federal programs, the Longshore and Harbor Workers' Compensation Act (Longshore Act) for maritime workers nationwide and the Federal Employees' Compensation Act (FECA) for federal government workers. The Longshore and FECA programs figure prominently in the discussion of compensation for diseases related to asbestos exposure, because much of it occurred in naval shipyards in World War II. There also is a Federal Black Lung program for coal miners and their families, which is intended to compensate for pneumoconiosis caused by exposure to coal dust.

When workers' compensation was carved out of the tort system, it was intended to be neither a new form of damages nor a retirement program. Today, its focus is on encouraging return to gainful employment. Consequently, eligibility for compensation is determined by injury in the course of employment that causes disability (i.e., loss of wages). To preserve the work incentive, cash benefits typically replace two-thirds of the worker's pay (in addition to full medical expenses). No compensation is payable for pain and suffering, loss of consortium, or other intangible losses, nor are there punitive damages.

In recent years, workers' compensation costs have become a major business expense for many employers. According to the Social Security Administration, the total cost to employers in 1982 (the most recent year for which statistics are available) was just over $22.5 billion -- an increase of more than 450% since 1970. The average cost per employee per year, according to the U.S. Chamber's Employee Benefits 1983 survey, was $258, although the average by industry is as high as $729 (for primary metal industries). The cost varies by occupations and jurisdiction (in 1984, Longshore Act insurance in the New York City port area costs as much as $21,000 per year for a longshoreman earning $24,000). In addition, the cost of workers' compensation insurance is adjusted according to the experience of each employer. Experience rating gives employers incentive not only to hold down costs through preventive measures but also to contest invalid claims. This latter "watchdog" effect is essential to police the program against fraud and abuse. No government agency has the motivation or information to be as effective as the employer in this respect.

Occupational Diseases Are Covered by Workers' Compensation

Appended to this statement is the chart on occupational disease coveragefrom our Analysis of Workers' Compensation Laws 1985 (Appendix I). As

BEST COPY AVAILABLE

this chart reflects, all occupational diseases are covered on a compulsory basis under all workers' compensation laws, including FECA and the Longshore Act. Benefits for diseases are the same as for traumatic injuries, and medical care is unlimited. Contrary to statements published in the news media, statistics compiled by the National Council on Compensation Insurance and other data confirm that claimants, in fact, do apply for and receive benefits for disability or death caused by occupational disease. However, such claims are a tiny fraction of workers' compensation claims - around one percent, representing two percent of total benefit costs.

Workers' compensation laws have been criticized as having arbitrary "barriers" that unfairly exclude legitimate claims. It is true that all workers' compensation laws contain statutes of limitations governing timeliness of claims filing. However, recognizing that some diseases have long latency periods, today most states allow claimants to file within a reasonable time after the disability occurs and the claimant knows or should know that it is traceable to employment. A minority of states have a limitation running from the date of last employment or last exposure. Some states, but not the federal Longshore or FECA programs, require that disability occur within a year or two after last exposure, and a small minority of states have minimum length-and/or-location-of-exposure requirements. Such provisions would not disqualify a claimant who has worked continuously for one employer but may disqualify an individual who has changed jobs frequently (for whom accurate information on employment or exposure may be unavailable).

Workers' compensation laws provide benefits at the same level whether disability is caused by disease or traumatic injury. However, because of the long latency and/or complex etiology of many diseases, actual awards may differ. For example, in a minority of jurisdictions,[10/] benefits are computed according to wages paid at the time of last exposure and thus may not be representative of actual earnings loss in cases where the disease does not

---

[10/] It is impossible at present to classify every state, because some never have had to address the issue, and others have conflicting precedents.

BEST COPY AVAILABLE

manifest itself until years later. Furthermore, if there is uncertainty over causation, liability, the degree of impairment, or similar issues, the parties may settle the claim voluntarily at a mutually agreed figure that reflects these uncertainties.

State Reforms of Workers' Compensation Laws

Workers' compensation certainly has its imperfections. Although it is risky to generalize because each of the 56 programs is different, many of them have deficiences that include insufficient emphasis on rehabilitation and early return to work, an alarming trend of judicial decisions creating exceptions to the exclusive remedy doctrine, increasing resort to litigation in a system designed to avoid the need for legal representation, and a disproportionate share of benefits paid to individuals with relatively minor injuries. Of course, for employers the overwhelming problems are the rapidly escalating burden of payroll costs and loss of productivity, especially acute for small business. Proposals for changes in a state's coverage of occupational diseases must be considered in the context of other problems that may affect a far greater universe of claims.

Public awareness of the need for improving workers' compensation may have been greatest following the 1972 report of the National Commission on State Workmen's Compensation Laws, but successful reform efforts have been continuous. The U.S. Chamber has long urged our membership to work for and support needed improvements in state and federal job injury laws. In addition, we have been active in seeking needed reform of the present federal programs.

Reform and modernization efforts by all interested parties have led to major improvements in benefits and coverage, which we have tracked in the Analysis. In 1972, for example, only nine states had a maximum weekly benefit over $80.00. Today, however, the average maximum is approximately $322.00. (See Appendix II.)

The reforms also have included substantial improvement in coverage of occupational diseases. There has been remarkable progress since the Chamber first began tracking disease provisions of state laws.

For example, in 1944 only 28 states were included in the occupational disease chart, and only eight of those states had compulsory coverage of all diseases. By 1970, all states covered diseases, but 15 still covered only those diseases listed by statute in a schedule. Today, however, all states either have abolished schedules of covered diseases or amended their laws to include all occupational illnesses not listed. Only a few states now deny compensation for partial disability in case of certain diseases, and all arbitrary limits on medical care for diseases have been repealed. Provisions for lower benefits in case of disability caused by disease have been abolished in all states.

Statutes of limitations have been extended for diseases with long latency periods. The majority of states now allow claims within a reasonable time after discovery of the disability and its relationship to employment. Even states with limitations running from last exposure or last employment have made exceptions for illnesses known to have long latency periods, such as diseases caused by radiation. A trend is under way in these states to apply similar rules to other long latency diseases. For example, last year alone, Alabama amended its law to allow claims for disability or death relating to occupational disease to be filed within two years (instead of one year); Illinois provided that a claim for asbestosis be filed within 25 years of last exposure; and New York expanded its time limit on claim filing to allow claims within two years of when claimant knows/should know relation to employment, while Washington and North Carolina now also will allow claims filed within two years of notification by competent medical authority. Other states have made similar changes in the past few years.

Efforts to speed up the reform process even more are now under way. A report on occupational disease prepared by Crum and Forster Insurance Companies, Inc., documenting the nature of the problem and recommending specific changes in state law, has been well received and widely publicized. A business and insurance task force on occupational disease under the aegis of the National Association of Insurance Commissioners (NAIC) and the International Association of Industrial Accident Boards and Commissions (IAIABC) recently has completed its own recommendations.

The NAIC Occupational Disease Advisory Committee's report [11] findings and accompanying conclusions were endorsed by the full NAIC on June 9, 1985, and we expect the report will be made available to policymakers and interested parties at the federal and state level. The NAIC Advisory Committee conclusions are significant for many reasons. The Committee:

- reaffirmed its support for and faith in state workers' compensation systems for injuries of all types, including occupational disease;
- recognized that the current problems involving asbestos litigation arise because of problems in tort law rather than workers' compensation and suggested that workers' compensation systems not be distorted in hopes of solving the problems of tort law, but also recognized that the overlap between the two systems is relevant to overall debate on occupational disease and that further research is needed to properly differentiate between the two;
- endorsed the continuing efforts to effect changes in state workers' compensation laws which remove barriers to prompt and equitable compensation to those individuals deserving of compensation;
- noted that, given current information, most state workers' compensation statutes do not contain barriers to compensation for occupational disease and that a continuation of the current claims trend into the future will not adversely affect any remaining states removing such barriers (the NAIC report does express caution, however, in that with the exact amount or volume of future claims being unknown, significant increases in such claims may adversely impact state workers' compensation systems); and,
- noted that, just as laws must be changed to assure compensation for deserving claimants, laws must also be strengthened to protect employers from liability where the illness is caused by the aging process or non-work factors or there is a low probability that the disease arose out of and in the course of employment.

---

[11] The Subcommittee should know that organized labor, while an official member of the NAIC Advisory Committee, failed to remain an active participant after the first few meetings. In a separate development, the AFL-CIO has formed a new legal rights foundation whose stated purpose is to try selected cases involving the cornerstone of workers' compensation systems -- the exclusivity doctrine. This reflects their belief that the doctrine hold only in cases where the employee is at fault. We believe that this is an unfortunate decision by the leadership within organized labor and we continue to monitor the situation, since continued employer support for workers' compensation is predicated upon preservation of the exclusivity doctrine.

The NAIC also recommended the appointment of an "interdisciplinary advisory committee to examine the appropriate interface between the tort and workers' compensation systems unless the Committee finds that other studies are covering this subject adequately." (See Appendix III.)

Further, the Executive Committee of the IAIABC, on August 21, unanimously endorsed the NAIC report's findings and conclusions. The IAIABC represents workers' compensation administrators, members of appeals boards and other state officials.

The U. S. Chamber is committed to the success of these efforts. In addition to the review of the injury compensation issue by the ad hoc council, our Council on Workers' Compensation, a standing policy committee, is working actively to assure that state workers' compensation laws are up to date with respect to compensating disability attributable to occupational disease. In late 1983, at the Council's request, our Board of Directors issued a call to action to our members, urging them to make sure that their state laws are fair and in accord with modern science. (See Appendix IV.) The Council and our staff continue to work with state business leaders to implement this process.

The Chamber recognizes that our contribution is only a small part of the equation and that there are many more related activities in progress, in both the public and private sectors. In particular, we commend this Subcommittee for these oversight hearings, which we hope will help spur states to action.

However, we must caution against undue expectations of overnight success. While we acknowledge a needed urgency for remedial action, a realistic understanding of the legislative and political process suggests that it can be time consuming. Many competing interests must be balanced, and ways found to implement improvements in benefits without driving employers out of business.

BEST COPY AVAILABLE

Federal Compensation Track Record

Inextricably bound in the policy debate over occupational disease is the historic question whether the state workers' compensation programs should be federalized, as advocated by organized labor.

As we have testified on numerous occasions before Congress, we strongly oppose federal programs designed to replace, supplant, or supplement state workers' compensation. We believe that, with all their imperfections, workers' compensation programs are designed and implemented best by state governments, which are more cognizant of and can be more responsive to local needs and circumstances.

Experience with the three federal compensation programs confirms the wisdom of the state approach. The Longshore Act, FECA, and the Black Lung program are all notoriously costly, slow in delivering benefits, and inefficient in weeding out questionable claims. None of this is news to this Subcommittee, which has oversight of all three.

The Black Lung Act is especially relevant to the occupational disease debate because it demonstrates the propensity of the federal government to establish costly entitlement programs in responding to this type of problem. The General Accounting Office has reported that in nearly nine out of ten cases claims are approved without medical evidence of disability caused by exposure to coal dust and that this unenviable record results from presumptions contained in the statute itself. Consequently, the Black Lung program has grown from a temporary program estimated to cost less than $90 million *in toto* into a permanent program costing more than $2 billion annually and contributing to the federal budget deficit.

A Black Lung Disability Trust Fund, financed by an excise tax on coal production, was established in 1978 to pay claims where the last employment was prior to 1970 or where no responsible coal mine operator could be identified. The fund was in deficit by $2.5 billion as of December 31, 1984, despite 1981 amendments that doubled the coal tax and revised eligibility criteria in an effort to make the fund solvent. Although the claims approval rate has dropped, the Reagan Administration concluded in its federal budget proposal for FY '86 that an additional coal tax is necessary. The House Ways and Means Committee recently included the coal tax increase in H.R. 3128, a package of revenue and spending provisions.

As parties involved in the current occupational disease debate and responsible for the development of public policy, we must ask ourselves if we have really learned a lesson from programs originating as a quick-fix federal panacea.

The Occupational Disease Compensation Act of 1985

Unlike some related bills (e.g., H.R. 1626, the Asbestos Workers' Recovery Act) which are designed to provide a solution to problems associated with a specific disease (asbestos), the subject H.R. 3090, the Occupational Disease Compensation Act of 1985, would provide a mechanism through which all occupational diseases deemed compensable could be potentially covered under a federal program.

We oppose H.R. 3090 and the concepts on which it is based. Among its major provisions, H.R. 3090 would:

- base benefit levels on national average wages and include annual cost of living adjustments, with no limit as to benefit duration;
- provide liberalized eligibility criteria based in part solely on exposure to a toxic substance;
- provide an automatic presumption for mesothelioma, asbestos and lung cancer (in the case of the latter and in the absence of radiological or historical evidence, assure presumption solely by length of time on the job for certain workers without regard to patient history or habits);
- liberalize claim filing procedures;
- create a massive federal bureaucracy, to administer the program, set insurance rates and "designate" employers to be covered on a compulsory basis;

BEST COPY AVAILABLE

- make suspension of payments difficult, if not impossible;
- create a special "risk assessment panel" to conduct additional research and education, promulgate additional standards, and erect additional surveillance programs;
- require the addition of other occupational diseases within the program's coverage by the panel, needing only to find enough of an equivalent exposure relationship to justify a "conclusive presumption;" and,
- would define "sufficient exposure" as "at least a 30% increase in the risk of developing a disease arising from such exposure."

Few issues cause our membership as much concern (particularly small firms) as the federalization of state workers' compensation laws, in whole or in part. We foresee extreme pressure on states to conform their statutes to a federal statute. The track record to date of federal administerion workers' compensation programs is poor at best. The ultimate effects of any federalization, however implemented, are profound. Finally, there is no justification for removing from the states the right to determine what is best for workers, employers and insurers in each state.

While we will not endeavor to analyze H.R. 3090 line by line, we will identify what we perceive to be the primary defects of this proposal:

(1) Biased Against Work. H.R. 3090 focuses on raising benefits, with the objective of improving the lot of injured workers, but is a disincentive for workers to return to the job. This proposal overemphasizes the cash recovery aspects of workers' compensation — a serious departure from the historic principle that workers' compensation should be geared to promote the earliest possible recovery and return to work and a productive place in society.

(2) Incomplete. The bill mandates huge benefit increases without addressing the much more troublesome aspects of workers' compensation, such as deficiencies in the delivery system and permanent partial awards, etc. As a result, the chance for meaningful reforms at the state level is thwarted because no basis is left for achieving a political compromise.

(3) Costly. It promises to be an exceedingly costly proposal because it implicitly promises to make workers' compensation into a comprehensive health care and income maintenance program for all private-sector employees irrespective of the cause or source of their disability. Based on the cost increases resulting from other federal workers' compensation programs (i.e., Black Lung,

FECA, and the Longshore & Harbor Workers' Act), a fivefold increase in costs for most employers is foreseeable -- an increase that will adversely affect U.S. employers' ability to meet foreign competition.

(4) Litigious. It would cause a dramatic increase in litigation by setting up a cumbersome collateral recovery system for workers' compensation claimants that by its nature would be litigious. The suggestion to allow a claimant to proceed in a federal forum following exhaustion of his state administrative (but not judicial) forum promises the prospect of both federal and state appeals proceeding simultaneously -- a potential double recovery (actually, a potential triple recovery, if one exercises the third party litigation option). As proposed, H.R. 3090 encourages forum-shopping. Few cases, if any, would be resolved finally at either the state administrative or judicial level as long as a federal alternative remained.

The result will be the dissipation of state awards on attorneys' fees incurred in litigating federal claims. Delay and uncertainty will only worsen. The injured worker would suffer most.

(5) Bureaucratic. There is also a serious question as to whether the Benefits Review Board and the Office of Workers' Compensation Programs would be able to cope with the added responsibilities assigned to them by H.R. 3090. All of these agencies have come under heavy criticism for their failure to cope with their present work loads. Of course, the cost of additional paperwork incurred by employers subject to new statistical reporting requirements will be passed on to the public in the form of higher prices, a further inflationary pressure.

(6) Federalization of Workers' Compensation. The bill could lead to a complete federalization of the system. In the initial phase, it provides uniform benefits for claimants in each state -- disregarding local needs and circumstances and putting the state systems out of balance. It thus substitutes the judgment of far-removed federal regulators for the expertise of state administrators. Moreover, benefits could be inflated by a single stroke of the pen regardless of need.

The second phase of federalization is the inevitable federal takeover of the entire system as the states, bearing the brunt of the abuses but unable to achieve reform, abandon workers' compensation to the federal government. The federal government should improve its existing workers' compensation programs before trying to assume additional responsibilities.

(7) Gamble on the Unknown. It asks the business community, workers, and the American public to buy, sight unseen, an untested dualized workers' compensation system. As explained above, such a system would be fraught with problems, many of which no doubt are not yet anticipated. The federal experience with workers' compensation heightens the uncertainty over what may occur in the future.

BEST COPY AVAILABLE

An Alternative: The Asbestos Claims Facility

We believe that all parties involved in the ongoing occupational disease debate have a sincere desire to provide prompt compensation to disabled workers. On March 19, 1985, the Senate Labor Subcommittee held a hearing on an unprecedented example of private-sector initiatives designed to extricate deserving claimants with asbestos-related diseases from the existing legal quagmire -- the formation of the Asbestos Claims Facility.

The "Wellington Facility" (named after Yale University Law School Dean Harry Wellington, who has been serving as the neutral moderator) represents a promising alternative, first for asbestos claims and ultimately for other claims. Many companies who are either manufacturers of asbestos or their insurers voluntarily conditionally have subscribed to the agreement, with the conversion to a final agreement expected within nine weeks.

In his March 19 testimony, Dean Wellington briefly described the Facility:

> It is important that the Asbestos Claims Facility is all voluntary. A plaintiff desiring to litigate through the courts will still be free to go that route, originally or at any time the plaintiff should be dissatisfied with the Facility.
>
> The signatories to the Agreement — the Facility's members — however, will refer all claims against them to the Facility for handling. And they will give the Facility authority to evaluate, settle, pay or defend all asbestos-related claims against them. This will greatly simplify procedures and reduce the time required to reach actual pay-out.
>
> Claimants will be required to submit certain standard information, including employment, medical and compensation history. The claimant will have to have been exposed to asbestos-containing products manufactured by one of the Facility's members and have a diagnosed asbestos-related disease.
>
> If a negotiated settlement cannot be reached, the Facility will offer a full range of mediation services. And, if a case cannot be settled by the "Alternate Dispute Resolution" procedure, the Facility will provide for the joint defense of all members, using a single defense team.

The Facility, by the way, will be funded by its members and will be a not-for-profit corporation.

We call to this Subcommittee's attention this voluntary and meritorious effort by manufacturers, insurers, labor and the trial bar to propose a solution indeed which may prove to mitigate the need for establishing a new federal entitlement program and fairly serve the various parties.

As John L. Baldwin, President and Chief Executive Officer for the Pittsburgh-Corning Corporation also noted at the March 19 hearing:

> It is an agreement that provides a much higher level of certainty for both producers and insurers, allowing us to devote our own energies where they really should be -- seeing to it that the truly injured workers are compensated in a timely and equitable fashion.

Manville Corporation Reorganization

Another private-sector initiative to address occupational disease has been provided by the Manville Corporation, a major defendant in asbestos class action litigation. They recently announced a reorganization plan which would establish a trust fund for the payment of asbestos-related claims, administered by five trustees approved by the bankruptcy court. (Manville filed Chapter XI bankruptcy in 1982.)

The trust's $2.5 billion in assets would include an initial payment of $846.5 million, a non-interest bearing loan of $1.65 billion (payable in yearly installments), stock equalling 50 percent of the company's outstanding shares, and other provisions and conditions.

Manville is working to receive shareholder and bankruptcy court approval and has also pledged to join the Wellington Facility. The agreement was reached with a special court-appointed representative of future claimants.

It is important to note that the formation of the Wellington Facility and the announcement of Manville's trust fund demonstrate that times have changed, and that private sector solutions, while not easy, are possible. We applaud these efforts.

Product Liability Law and Occupational Disease

Workers' compensation is an individual's first avenue of protection in case of occupational injury and ordinarily constitutes the exclusive remedy against the employer. However, tort liability for injuries caused by parties outside the workplace continues independent of any right to workers' compensation.

Critics of workers' compensation charge that its inadequacies are responsible for the asbestos tort litigation. We believe otherwise -- the occupational tort litigation can be better accounted for by the differences in function and purpose between the no-fault workers' compensation system and the fault-based tort system. The fact that a substantial percentage of the asbestos tort plaintiffs are covered by the Longshore Act or FECA, the most generous workers' compensation systems in the country, confirms this belief.

No matter how generous a workers' compensation program may be, a worker has little to lose and much to gain by seeking a tort recovery. Tort cases, unlike workers' compensation, usually are handled on a contingency fee basis, and offer the opportunity to recover unlimited damages for economic and intangible losses, plus the possibility of punitive damages. Furthermore, unlike workers' compensation, a tort recovery may be possible for a physical impairment that may not cause any interruption of income (as is the case presently with respect to much of the asbestos litigation).

In fact, for tactical and other reasons, some individuals decline to file for workers' compensation, which requires an impartial medical examination, regulates attorney fees, and must be coordinated with Social Security Disability Insurance. In addition, because any workers' compensation received usually is deductible from the tort judgment or settlement, plaintiff's counsel may be reluctant to try a case twice for one recovery. In some instances, the plaintiffs' bar is unfamiliar with workers' compensation, and a separate claimants' bar handles such cases.

The tiny number of claims filed with California's special workers' compensation asbestos fund, which is specifically designed to remove barriers to compensation for workers suffering from asbestos-related diseases, may provide additional evidence that only a small percentage of asbestos plaintiffs are actually disabled by, rather than simply exposed to, asbestos.

Moreover, employers themselves may initiate tort claims against manufacturers. Except in two states, workers' compensation laws allow the employer to recover compensation benefits from any third party tort settlement or judgment.[12/] Indeed, the right to sue the manufacturer typically passes to the employer after a prescribed time, if not exercised by the employee. This right is referred to as the "employer's lien" or "right of subrogation."

Existing product liability tort law is in serious need of reform. Rules determining the liability of product sellers for product-related injuries vary widely and often are in direct conflict from one state to another. Moreover, because these rules are created judicially, they may change as the judicial temperament changes. The result is a wide variation of law which is changing constantly and is totally unpredictable.

This wide variation limits the ability of manufacturers to make informed decisions regarding the design of products for nationwide distribution and sale. For this reason the U.S. Chamber has taken a strong position in favor of S. 100, the proposed federal Product Liability Act, which would bring certainty to the law and ease what has become a serious burden on interstate commerce.

S. 100, however, is not designed as a remedy for the "toxic torts" problem, although several of its provisions would come into play in occupational disease tort cases. For example, the statute of limitations in product liability tort cases would run from discovery, rather than last exposure as required in some states at present.

[12/] In Ohio, the employer may recover the increase in workers' compensation premium caused by injury for which a third party is liable.

S. 100 seeks to strengthen the tort system by reinforcing its fault-based foundation and by sharpening distinctions between workers' compensation and tort. One way in which S. 100 would accomplish this is by prohibiting worker suits against their employers under the discredited "dual capacity" theory or through the artifice of an action against a third party who may, in a few states, be allowed to implead the employer. These provisions should be extended to cover so-called "intentional tort" and co-employee suits.

Several related provisions in S. 100, however, have proven controversial among our members. The bill would remove the employer's right of subrogation in workers' compensation cases where third party liability may exist and require the trial court in a product case to deduct the amount of workers' compensation which would be payable if the tort plaintiff had filed a workers' compensation claim. These provisions have a direct bearing on tort liability for asbestos-related diseases and could result in shifting liability from manufacturers to employers. More information on the effect of these provisions would be beneficial and this subcommittee could provide invaluable assistance in conducting research on them. Even as we acknowledge the value of additional information on these points, we nevertheless urge Congress to enact S. 100 without further delay.

Finally, we note that in conjunction with product liability tort reform as embraced in S. 100, the Senate Commerce Committee is exploring whether a no-fault product liability compensation remedy would be desired, as suggested by Senators Dodd (D-CT) and Gorton (R-WA). These proposals are conceptually similar to H.R. 1626, in that they offer a no-fault benefit in lieu of tort rights that would supplement workers' compensation or other existing sources of compensation. Of course, the Dodd and Gorton proposals would apply to all injuries caused by products, not just asbestos-related illness.

The Dodd and Gorton proposals have prompted an effort to develop an alternative, binding arbitration mechanism which would include occupational disease product liability claims. This effort was initiated by Senator Danforth (R-MO).

These and similar proposals are intriguing in that proponents claim they provide a mechanism to protect individuals who otherwise may "fall between the cracks." On the other hand, they also give rise to many difficult problems. For example, to the extent that they would deny workers any right to sue third parties, they raise questions about Constitutionality and the likelihood of public acceptance. We call the Subcommittee's attention to attempts by three states to cut off workers' rights to sue third parties which have failed to pass judicial or legislative muster. We are now reviewing the Danforth, Dodd and Gorton proposals in our policy committee governing product liability and may have a more detailed analysis at a later time.

National Business Council on Injury Compensation

The general subject of unintended injury to people as a result of exposure to hazardous substances is of broad interest to the business community. Examination of the scope of the problem, identification of specifics, and means of dealing fairly with those who might be so injured require the expertise of many disciplines. Two years ago, the Chamber convened what was called the ad hoc National Business Council on Injury Compensation to develop recommendations as to how the business community could responsibly respond to problems related to exposure to hazards.

The Council of approximately 45 professionals included experts in law, toxicology, epidemiology, insurance, workers' compensation, chemistry, engineering, consumer product safety, worker safety, environmental management, and more. Most members were drawn from the approximately eight or so policy committees of the Chamber affected by this important issue. Others were added to assure that all necessary disciplines were represented. The Council was chaired by Mr. Van Smith, then Chairman of the Board of the U.S. Chamber, an attorney and small businessman with direct experience in some of the fields of import.

The Council addressed three broad subsets of the subject: (1) the extent of public and private coverage for people harmed through no fault of their own -- including administrative and legal remedies, such as workers' compensation and tort; (2) the relationship between medical causation and law and how to bring the two closer together; and (3) a review of legislative and related proposals to deal with injury compensation.

The Council identified that in 1982 (some statistics were for 1981) first-party insurance and tort payments totaled $142.5 billion, indicating that at least this level of compensation was provided for varying types of disease and injury. Federal government payments alone for health and disability in 1981 were $109.6 billion for some 38.8 million beneficiaries. Approximately 108 million persons were covered by health insurance, 164 million covered for physician's expenses, 158 million by major medical, and 80 million by disability insurance, among others. On the basis of this and other information, the Council found that the present extent of coverage is broad.

A review of the present tort and workers' compensation systems showed both successes and failures in providing recourse for injured parties. Some needed improvements were identified. Both the administrative and tort systems in place today were judged against their intended goals.

At the outset, an attempt was made to identify those groups in our population who may be falling through the safety net of public and private compensation systems. Research showed that this was not possible. However, those caught by this net could be counted (although not unambiguously), and the number is quite high.

The nexus between science and law for the determination of causation was examined. Proper determination of causation is essential in order not to deny those harmed compensation (and treatment) and not to charge falsely those who are not responsible. At the same time, it was recognized that science is rarely able to establish unequivocally causation. Medicine, biology and the related sciences needed to establish causation are complex and incomplete in their understanding of disease etiology and the human body. A patient's medical history and life-style enter into questions of causation as well.

The Council not only called for the wider application of "good science" but also outlined how this might be achieved. Koch's postulates of causation, first published in the last century and updated with the understanding of viral diseases, still hold. The Council outlined how these might be applied in independent determinations of causation and responsibility.

They reasoned that bringing good science into the decisionmaking process will not cure the problem presented by juries who rule for plaintiffs out of sympathy for their injuries or diseases rather than by a weighted conclusion of the defendant's responsibility. This problem should be dealt with by determining causation and responsibility issues first and separately from issues of injury and damages and certainly not in the reverse order. The scientific data needed to establish a standard of scientific proof should consist of adequately controlled studies in animals and/or humans by methods technically and reasonably applicable and acceptable to the professions. Methods for applying this standard and related standards of professionalism to determining causation have been outlined by the Council.

Finally, the Council reviewed and criticized (positively and negatively) several proposals for dealing with injury compensation. Proposals were examined by discussing the spectrum of choices each contains by comparison of trade-offs. There is no inference that any of the trade-offs are necessarily viable or acceptable to any of the participants in the debate but are presented in the report as a means of illustrating the complexities of the issues.

A principal finding was that the new proposals typically confuse or blur the distinctions between fault and no-fault compensation systems. The debate would be clarified significantly if the participants could be persuaded to recognize that there are choices or trade-offs involved in shifting back and forth between the two.

The ad hoc National Business Council on Injury Compensation made several recommendations, which were adopted as policy by the Chamber's Board of Directors. These are included here as Appendix V. We urge the Subcommittee's careful review of the Council's report which has been made available to you.

CONCLUSION

The preceding only hints at the misgivings about H.R. 3090 that are shared by the entire business community and many others. The U.S. Chamber advocates enactment -- state by state -- of legislation that will provide the best care for injured workers, consistent with need and motivation, that will reduce fraud and abuse, and that will control the runaway cost of workers' compensation. The federal government may play a constructive role as a catalyst for progressive change. Unfortunately, H.R. 3090 does not provide the means of achieving meaningful reform.

Workers who are disabled by occupational disease should receive compensation and now have access to the workers' compensation and tort systems. Workers' compensation laws provide benefits for occupational diseases when claimants can prove that their disabilities result from workplace exposure. While imperfect, these programs have undergone and continue to undergo major improvements, including their coverage of occupational diseases. The business community is working to facilitate the process of removing restrictions in a handful of state laws that may unfairly prevent payment of compensation for a disease that has a long latency period. Furthermore, there are no "barriers to compensation" in the two federal workers' compensation programs that cover many of the asbestos tort plaintiffs.

There are indeed serious problems with compensating illness related to workplace exposure through the tort system, but these problems are not attributable to workers' compensation, and federalization of workers' compensation will not solve them. The poor record of existing federal programs substantiates our view that workers' compensation should be left to the states.

Reform of the tort system generally is needed to strike a balance among the rights of plaintiffs and defendants, individuals, businesses, and society. The Chamber strongly supports S. 100, the federal Product Liability Act but recognizes that it is not designed to address the particular problems of compensating individuals whose diseases arise after a long latency period and/or have complex or unknown etiology.

We sincerely hope that the ad hoc Council and NAIC reports (along with their recommendations) will assist the subcommittee in illuminating the many complex and often overlapping medical, scientific and legal issues surrounding the occupational disease debate.

Finally, we respecfully urge this subcommittee -- and the Congress -- to give due consideration and weight to these issues, whose resolution will allow all concerned parties to reach our common goal of providing prompt and equitable compensation to those truly disabled and deserving workers, just as all who are participating in the Wellington Facility are attempting to do.

We stand ready to assist the Subcommittee in the future on these and other issues of concern. Thank you for the opportunity to present our views.

Appendix I

CHART IV COVERAGE OF OCCUPATIONAL DISEASES January 1, 1985

JURISDICTION	NATURE OF COVERAGE¹	MEDICAL BOARDS	ONSET OF DISABILITY OR DEATH	TIME LIMIT ON CLAIM FILING	DEDUCTIONS FROM DEATH AWARDS	MEDICAL CARE	COMPENSATION²
ALABAMA	All diseases		[illegible]	[illegible]		Unlimited	[illegible]
ALASKA	All diseases			[illegible]		Unlimited	Same as for accidents
AMERICAN SAMOA	All diseases	[illegible]		[illegible]		Unlimited	Same as for accidents
ARIZONA	All diseases	[illegible]	[illegible]	[illegible]	Disability payments	Unlimited	Same as for accidents
ARKANSAS	All diseases		[illegible]	[illegible]		Unlimited	[illegible]
CALIFORNIA	[illegible]			[illegible]		Unlimited	Same as for accidents
COLORADO	All diseases		[illegible]	[illegible]		Unlimited	Same as for accidents
CONNECTICUT	All diseases	[illegible]		[illegible]		Unlimited	Same as for accidents
DELAWARE	All diseases			[illegible]		Unlimited	Same as for accidents
DISTRICT OF COLUMBIA	All diseases			[illegible]		Unlimited	Same as for accidents
FLORIDA	All diseases		[illegible]	[illegible]		Unlimited	Same as for accidents
GEORGIA	All diseases	[illegible]	[illegible]	[illegible]	Disability payments	Unlimited	[illegible]
GUAM	All diseases			[illegible]		Unlimited	Same as for accidents
HAWAII	All diseases			[illegible]		Unlimited	Same as for accidents

¹[illegible]

²[illegible]

[illegible]

BEST COPY AVAILABLE

CHART IV ☐ COVERAGE OF OCCUPATIONAL DISEASES ☐ January 1, 1985 (continued)

JURISDICTION	NATURE OF COVERAGE[1]	MEDICAL BOARDS	ONSET OF DISABILITY OR DEATH	TIME LIMIT ON CLAIM FILING	DEDUCTIONS FROM DEATH AWARDS	MEDICAL CARE	COMPENSATION[2]
IDAHO	All diseases		[illegible]	[illegible]	Disability payments	Unlimited	[illegible]
ILLINOIS	All diseases		[illegible]	[illegible]	[illegible]	Unlimited	Same as for accidents.
INDIANA	All diseases		[illegible]	Within 2 years after disablement or death.	Disability payments	Unlimited	Same as for accidents.
IOWA	All diseases	[illegible]	[illegible]	[illegible]	Same as for accidents	Unlimited	[illegible]
KANSAS	All diseases		[illegible]	[illegible]		Unlimited	Same as for accidents.
KENTUCKY	All diseases			[illegible]		Unlimited	[illegible]
LOUISIANA	All diseases		[illegible]	[illegible]	Same as for accidents	Unlimited	Same as for accidents.
MAINE	All diseases		[illegible]	[illegible]	Disability payments	Unlimited	Same as for accidents.
MARYLAND	All diseases			[illegible]		Unlimited	Same as for accidents.
MASSACHUSETTS	All diseases			[illegible]	Disability payments	Unlimited	Same as for accidents.
MICHIGAN	All diseases			[illegible]		Unlimited	Same as for accidents.

[illegible]

CHART IV □ COVERAGE OF OCCUPATIONAL DISEASES □ January 1, 1985 (continued)

[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]			[illegible]		[illegible]	[illegible]
[illegible]	[illegible]			[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]		[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]			[illegible]		[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]		[illegible]	[illegible]
[illegible]	[illegible]			[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]			[illegible]		[illegible]	[illegible]
[illegible]	[illegible]		[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]			[illegible]		[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]		[illegible]	[illegible]
[illegible]	[illegible]		[illegible]	[illegible]		[illegible]	[illegible]
[illegible]	[illegible]	[illegible]		[illegible]		[illegible]	[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

BEST COPY AVAILABLE

CHART IV □ COVERAGE OF OCCUPATIONAL DISEASES □ January 1, 1985 (continued)

JURISDICTION	NATURE OF COVERAGE	MEDICAL BOARDS	ONSET OF DISABILITY OR DEATH	TIME LIMIT ON CLAIM FILING	DEDUCTIONS FROM DEATH AWARDS	MEDICAL CARE	COMPENSATION
OKLAHOMA	All diseases		[illegible]	[illegible]		Unlimited	Same as for accidents
OREGON	All diseases			[illegible]		Unlimited	Same as for accidents
PENNSYLVANIA	All diseases	[illegible]	[illegible]	[illegible]		Unlimited	Same as for accidents
PUERTO RICO	Diseases as provided by law		[illegible]	[illegible]		Unlimited	Same as for accidents
RHODE ISLAND	All diseases	[illegible]		[illegible]	Disability payments	Unlimited	Same as for accidents
SOUTH CAROLINA	All diseases	[illegible]	[illegible]	[illegible]	Disability payments	Unlimited	[illegible]
SOUTH DAKOTA	All diseases	[illegible]	[illegible]	[illegible]	Disability payments	Unlimited	[illegible]
TENNESSEE	All diseases			[illegible]	[illegible]	Unlimited	[illegible]
TEXAS	All diseases	[illegible]		[illegible]	[illegible]		Same as for accidents
UTAH	All diseases	[illegible]	[illegible]	[illegible]	Disability payments	Unlimited	Same as for accidents
VERMONT	All diseases		[illegible]	[illegible]		Unlimited	[illegible]
VIRGIN ISLANDS	All diseases			[illegible]		Same as for accidents	Same as for accidents
VIRGINIA	All diseases		[illegible]	[illegible]	Disability payments	Unlimited	[illegible]
WASHINGTON	All diseases			[illegible]		Unlimited	Same as for accidents

Okla. [illegible]

Ore. [illegible]

Pa. [illegible]

S.D. [illegible]

Utah [illegible]

Va. [illegible]

[illegible]

CHART IV ☐ COVERAGE OF OCCUPATIONAL DISEASES ☐ January 1, 1985 (continued)

JURISDICTION	NATURE OF COVERAGE[1]	MEDICAL BOARDS	ONSET OF DISABILITY OR DEATH	TIME LIMIT ON CLAIM FILING	DEDUCTIONS FROM DEATH AWARDS	MEDICAL CARE	COMPENSATION[2]
WEST VIRGINIA	All diseases	Occupational Pneumoconiosis Board appointed by Commissioner determines medical questions	[illegible]	[illegible]		Unlimited	Same as for accidents
WISCONSIN	All diseases	[illegible]		[illegible]		Unlimited	Same as for accidents
WYOMING	All diseases	Yes		[illegible]	Disability payments	Unlimited	Same as for accidents
F.E.C.A.	All diseases			[illegible]		Unlimited	Same as for accidents
LONGSHORE ACT	All diseases			[illegible]		Unlimited	Same as for accidents[3]
ALBERTA	All diseases	[illegible]		[illegible]		Unlimited	Same as for accidents
BRITISH COLUMBIA	All diseases	[illegible]		[illegible]		Unlimited	Same as for accidents
MANITOBA	All diseases	[illegible]		[illegible]		Unlimited	Same as for accidents
NEW BRUNSWICK	[illegible]			[illegible]		Unlimited	Same as for accidents
NEWFOUNDLAND	All diseases	[illegible]		[illegible]		Unlimited	Same as for accidents
NORTHWEST TERRITORIES	All diseases	[illegible]		[illegible]		Unlimited	Same as for accidents
NOVA SCOTIA	All diseases	[illegible]	[illegible]	[illegible]		Unlimited	Same as for accidents
ONTARIO	All diseases			[illegible]		Unlimited	Same as for accidents
PRINCE EDWARD ISLAND	[illegible]		[illegible]	[illegible]		Unlimited	Same as for accidents
QUEBEC	[illegible]		[illegible]	[illegible]		Unlimited	[illegible]
SASKATCHEWAN		[illegible]	[illegible]	[illegible]		Unlimited	Same as for accidents
YUKON TERRITORY	All diseases	[illegible]	[illegible]	[illegible]		Unlimited	Same as for accidents
CANADIAN MERCHANT SEAMEN'S ACT	All diseases	[illegible]					

[illegible]

B.C. [illegible]

Quebec: [illegible]

Yukon: [illegible]

BEST COPY AVAILABLE

Appendix II

WORKERS' COMPENSATION — TOTAL DISABILITY
MAXIMUM WEEKLY BENEFIT FOR INDIVIDUAL, NO DEPENDENTS

	MAXIMUM	PERCENTAGE OF STATE AVERAGE WEEKLY WAGE
ALABAMA	$ 290	100%
ALASKA	1114	200%
ARIZONA	204*	
ARKANSAS	154	
CALIFORNIA	224	
COLORADO	316*	80%
CONNECTICUT	381	100%
DELAWARE	232*	66 2/3%
DISTRICT OF COLUMBIA	413*	100%
FLORIDA	307	100%
GEORGIA	135	
HAWAII	291	100%
IDAHO	261*	90%
ILLINOIS	492*	133 1/3%
INDIANA	166	
IOWA	580	200%
KANSAS	227	75%
KENTUCKY	305*	100%
LOUISIANA	248	66 2/3%
MAINE	448*	166 2/3%
MARYLAND	327	100%
MASSACHUSETTS	341*	100%
MICHIGAN	358	90%
MINNESOTA	329	100%
MISSISSIPPI	126	
MISSOURI	223	66 2/3%
MONTANA	286	100%
NEBRASKA	200	
NEVADA	325*	100%
NEW HAMPSHIRE	440	150%
NEW JERSEY	269	75%
NEW MEXICO	299*	100%
NEW YORK	275	
NORTH CAROLINA	282	100%
NORTH DAKOTA	285	100%
OHIO	354	100%
OKLAHOMA	217	66 2/3%
OREGON	324*	100%
PENNSYLVANIA	336	100%
RHODE ISLAND	292	100%
SOUTH CAROLINA	287*	100%
SOUTH DAKOTA	247	100%
TENNESSEE	136	
TEXAS	203	
UTAH	TT-310 PT-264	TT-100% PT-85%
VERMONT	278	100%
VIRGINIA	295	100%
WASHINGTON	256*	75%
WEST VIRGINIA	321*	100%
WISCONSIN	321	100%
WYOMING	TT-347 PT-232	TT-100% PT-66 2/3%
LONGSHORE	580*	200% of National Average Weekly Wage
FECA	980*	

*Rounded to nearest dollar

PREPARED BY: SAMUEL A. ROTH, ASSOCIATE MANAGER, EMPLOYER RELATIONS
CHAMBER OF COMMERCE OF THE UNITED STATES (202) 463-5514

BEST COPY AVAILABLE

Appendix III

RESOLUTION
WORKERS' COMPENSATION (D) TASK FORCE
OF THE
NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS

WHEREAS, the Workers' Compensation (D) Task Force (hereinafter "Task Force") of the National Association of Insurance Commissioners (NAIC) appointed an Advisory Committee to study occupational disease issues because of the Task Force's concern about the ability of the present workers' compensation system to respond adequately to future occupational disease claims; and

WHEREAS, the NAIC Occupational Disease Advisory Committee has completed its study and is commended for its thorough and excellent report; and

WHEREAS, the Task Force acknowledges with appreciation the assistance of the International Association of Industrial Accident Boards and Commissions (IAIABC) in this regard and looks forward to future joint efforts with the IAIABC concerning vital workers' compensation issues that are of mutual concern; and

WHEREAS, the Task Force supports the continuation of the state workers' compensation system; and

WHEREAS, there is an ongoing need for the states to consider how the coverage and administrative provisions of their workers' compensation laws should be modernized.

NOW, THEREFORE, BE IT RESOLVED that the Task Force believes that consideration should be given by states to the legal and administrative recommendations developed by the Advisory Committee. The retroactive application of these recommendations, however, is inappropriate unless special funding methods are established.

BE IT FURTHER RESOLVED that the Task Force, after reviewing the Advisory Committee's comprehensive and indepth analysis of occupational disease funding issues, believes that the Advisory Committee's recommendations for coping with an unexpected emergence of occupational disease claims deserve consideration by concerned states and private parties.

BE IT FURTHER RESOLVED that the Task Force urges regulators, legislators, and others to remain alert to new developments and new information regarding occupational disease that could create significant pricing and funding problems for insurers and self-insurers and to be prepared to take timely action to assure the continued financial integrity of the workers' compensation system.

FINALLY, BE IT FURTHER RESOLVED that the Task Force agrees with the Advisory Committee that the proper relationship between tort and workers' compensation remedies is important for the preservation of the state workers' compensation system and the exclusive remedy doctrine. Accordingly, the Task Force recommends that the NAIC request the Commercial Lines - Property and Casualty (D) Committee to appoint an interdisciplinary advisory committee to examine the appropriate interface between the tort and workers' compensation systems unless the Committee finds that other studies are covering this subject adequately.

MINUTES
THE WORKERS' COMPENSATION (D) TASK FORCE
KANSAS CITY, MISSOURI
JUNE 12, 1985

The Workers' Compensation (D) Task Force met in the Chicago Room of the Hyatt Regency in Kansas City, Missouri, at 12:00 noon on June 12, 1985. A quorum was present and S. David Childers chaired the meeting. The following task force members or their representatives were present:

S. David Childers, Chair (Arizona); Vicente B. Jasso, Vice-Chair, (New Mexico); Peter W. Gillies (Connecticut); Bill Gunter (Florida); Mario R. Ramil (Hawaii); Wayne L. Soward (Idaho); Gil McCarty (Kentucky); James P. Corcoran (New York); Thomas P. Fox (Wisconsin).

1. Resolution Regarding the Occupational Disease Advisory Committee Report

   The Chair stated he had called a second meeting of this task force for the purpose of reviewing a draft resolution accepting the report submitted by the Occupational Disease Advisory Committee on June 9, 1985. A brief discussion of the resolution ensued.

   Upon a motion duly made and seconded, the Task Force accepted the Committee's report and adopted the resolution (see Attachment "A").

Having no further business, this meeting was adjourned at 12:10 p.m.

S. David Childers, Chair, AZ

Vicente B. Jasso, Vice-Chair, NM

Peter W. Gillies, CT

Bill Gunter, FL

Mario R. Ramil, HI

Wayne L. Soward, ID

Gil McCarty, KY

Theodore T. Briggs, ME

James P. Corcoran, NY

Thomas P. Fox, WI

A signature on an NAIC report warrants that the report fairly and accurately represents the proceedings of the meeting. It does not imply agreement with the substance of the report.

Appendix IV

Chamber of Commerce
of the United States
1615 H Street, N.W.
Washington, D.C. 20062

NEWS RELEASE

FOR MORNING RELEASE
Thursday, November 17, 1983

Contact: Frank Benson
(202) 463-5682

U. S. CHAMBER BOARD CALLS ON BUSINESS TO BACK NEEDED CHANGES IN STATE LAWS COVERING OCCUPATIONAL DISEASE COMPENSATION

WASHINGTON, Nov. 16 -- Individual businesses as well as business groups across the nation should work for enactment of appropriate improvements in their state workers' compensation laws governing occupational disease where needed, the U.S. Chamber of Commerce is urging its members.

At the regularly scheduled fall meeting of the Chamber's 65-member Board of Directors last week, the policy-setting arm of the business federation called on its members to back appropriate reforms of their state occupational disease laws, and to use their "best efforts" to bring about legislative enactment of such reforms.

The Chamber Board adopted this stance acting on the recommendation of its Employee Benefits Committee and the Committee's Council on Workers' Compensation. Official Chamber policy previously called on members of the business organization to "use their best efforts to see to it that workers' compensation laws are in accord with modern concepts."

An updated review of the workers' compensation field, explained Jeffrey Joseph, led the Council to the conclusion "that necessary changes (in state workers' compensation laws) will be relatively modest." The Council "has concluded that workers' compensation laws do a much better job of compensation for occupational disease than their critics give them credit for," added the Chamber vice president for domestic policy. However, it is necessary to remove the appearance of unfairness to short-circuit efforts to federalize the workers' compensation system, he explained.

The formal policy statement adopted unanimously by the Chamber Board reads:

"The Chamber of Commerce of the United States recommends to its members that appropriate reforms of state occupational disease laws be supported where needed and that its members further use their best efforts to facilitate the enactment of these reforms."

According to Eric Oxfeld, the Chamber's employee benefits attorney and staff executive for the Council on Workers' Compensation, the Chamber plans to launch a major initiative along these lines. The organization's extensive communications network will be utilized to publicize the message through letters to members, articles in the Chamber's periodic publications, programming on the organization's television and radio networks and possibly one or more conferences on the issue.

(83-328)

#####

Appendix V

RECOMMENDATIONS OF THE AD HOC NATIONAL BUSINESS COUNCIL ON INJURY COMPENSATION

In a technologically advanced society, individuals can be exposed to hazards that may result in acute or chronic injury due to no fault of their own. It is a long-standing tradition of American society to seek to ensure that injured individuals are cared for and appropriately compensated. The U.S. Chamber supports the continuation of this tradition as an important element of a society that places a high value on fairness and the well-being of its people.

There are numerous remedies presently available to the American public to provide compensation for injury. These existing compensation systems include common law tort liability and its statutory derivatives, statutory no-fault administrative systems, hybrid statutory and common law remedies, contractual insurance coverages, and a wide variety of taxpayer and industry financed public programs.

Viewed against their intended goals, the U.S. Chamber believes that each of these systems works reasonably well for most Americans. At the same time, improvements are needed, such as in the tort and workers' compensation systems. Also adjustments in one or more of the other systems may be appropriate to rectify specific inadequacies, and ensure that those deserving compensation, but not receiving it, do. The U.S. Chamber encourages modifications, where necessary, at the appropriate level of government, that will achieve improvements without jeopardizing the entire foundation of these well-established compensation systems.

In determining compensation for injury, questions of causation need to be addressed. The extent to which these questions are adequately answered is a measure of both the fairness of the system for the parties involved, as well as of the degree to which the system meets society's injury compensation goals. Greater attention and effort must be applied to join the requirements of both administrative and legal compensation systems with the requirements of science in determining injury causation. The U.S. Chamber supports efforts to better clarify and refine the nexus between science and law in determining compensation and encourages its members to work with the public, the scientific community, and government to achieve this goal.

When determining modifications that may be necessary in existing compensation systems, and in evaluating the need for any new system, careful consideration must be given to the intended purposes of each and the trade-offs that may be involved in selecting among various injury compensation policy options. The Chamber offers the following principles to guide the evaluation and selection of new proposals, or modifications to existing compensation systems.

- Most existing compensation systems fall into one of two categories:

    - fault-based systems, in which individuals who are harmed by the fault of another are compensated by the wrongdoer; or

    - no-fault systems, in which individuals who are harmed are compensated without regard to fault.

  Compensation systems developed under the first category are designed to perform different functions than those of the second. These distinctions are important and should be maintained.

- The tort liability system is no longer the only means of assuring compliance with societal norms. Other societal institutions also play a significant and increasing part in setting and enforcing standards of behavior. Therefore, compensation systems should not be viewed or used as the primary means to punish, blame, or prevent socially unacceptable conduct.

- Distinctions must be made between the desire to compensate and punish harmful conduct that is wrong, and to compensate for the consequences of harmful conduct that is not wrong. Affixing blame and assessing damages to punish and deter harmful conduct where fault is not at issue are inconsistent and inherently unfair.

- Balance must be struck among the level of proof required of claimants, the amount of blame attached to defendants, and the amount of compensatory awards. A fair and practical compensation system must consider the trade-offs that exist among the often competing interests of damages allowable, proof of causation requirements, evidentiary standards, the exclusivity of remedies, and who should pay. In order for a system to be workable and fair, both plaintiffs and defendants will have to balance these choices.

- Compensation systems must recognize that, while innocent defendants should not be punished, innocent claimants may well have legitimate needs which require compensation.

- Where compensation costs are imposed on industry, there must be recognition that these extra costs may have adverse social consequences. These social consequences must be considered and balanced against the need and purpose of any new proposals or modified compensation systems. Efforts must be made to minimize aggregate costs and eliminate excessive transaction costs.

- Because financial resources are finite, the types and amounts of compensatory awards allowable under any one or a combination of compensation systems must be chosen carefully and weighed against other important resource commitments deemed necessary by society. Policy choices must recognize that resource commitments in one area may foreclose commitments in other important areas.

Mr. Murphy. Thank you very much, Doctor.

I understand that the chamber favors the Wellington Group solution; is that so? Do you favor that approach? Have you examined that?

Mr. Alter. Yes, sir, we have followed it. It has a certain intrigue to us. As private marketeers, of course, we like it—it is a private market solution. We have pointed out almost the entire time of Dean Wellington's convening the group discussion, the potential advantages of their approach. And now as the reports come in, we see that some of those advantages are being lived up to, even in the short time that they have been in existence. We have some enthusiasm for it, to say the least.

Mr. Murphy. Do you think that the current levels of State occupational disease compensation are adequate? I think that you would have to look at that in order to come to some of the conclusions that you have.

Mr. Alter. I think both of us should answer that, if you will permit, for two different perspectives.

From the perspective of our expert council, I don't think there's a simple yes or no answer. The quantitative levels as published, yes, are hard. But in the few States, for example, where there are severe deficiencies such as on statute of limitations and repose, the numbers are. So the levels could be sufficient if, these deficiencies are not in individual States.

Mr. Roth. The only thing that I would add really is that the compensation, we believe, should be based not necessarily on exposure, but rather that some disablement, that is, loss of wages has occurred, and that is what the system is designed to replace.

One of the problems with H.R. 3090, is that you are going to be faced with a total inequity—how are you going to justify the separate treatment of individuals compensated under that mechanism vis-a-vis State workers' compensation? There's going to be an obvious total inequity that's going to have to be rectified and we feel it's a bad direction to be heading in.

Mr. Murphy. Thank you.

Mr. Bartlett.

Mr. Bartlett. Thank you, Mr. Chairman.

I want to see if I understand with some precision the chamber's testimony .

Do you then favor generally continuing the status quo in asbestos cases, at least at the Federal level, with the enormous difficulties we are having—unfairness in equity in the tort system?

Mr. Alter. Mr. Bartlett, the status quo——

Mr. Bartlett. I have never heard the chamber advocate the status quo before. So I hope you start shaking your head.

Mr. Alter. Everyone would agree, I think, the status quo is insufficient, or we wouldn't be here this morning, and certainly the chamber, among others, would not have put in the effort they have in seeking other solutions.

The question of the Federal involvement is something, again, that was addressed by various chamber committees, including the expert panel. As Mr. Roth pointed out, our members clearly do not want Federal involvement in workers' compensation systems. And as we reviewed the literature of the Federal track record in other compensation systems, I don't think it's a track record that we the people of the United States should be very proud of.

The question then comes up: What is the appropriate Federal involvement? What should be the Congress' action to respond to correcting the asbestos situation, and any other that may arise? We would all hope that none do. We don't see it today and I hope we never do. So I think it is a question of kind rather than a yes or no.

The chairman made a suggestion a few moments ago to Mr. Parker: What if the Congress contributed to the Wellington facility? Personally, I find that an intriguing suggestion. I first heard it sometime ago in private circles, and I am delighted, sir, that you have made it in this public circle, I think it is an intriguing challenge to the Congress if they can make a contribution without meddling. Rarely does it seem that the Federal Government does anything simply. Wouldn't it be nice if a simple contribution without meddling can be made to see how it works?

Mr. **Bartlett**. I agree that is an intriguing suggestion, and I may come back and pursue that with you in a moment. Let me see if I can approach your answer to my question in a different way.

It seems to me that we face essentially the same difficulty in asbestos tort liability, with the tort system, the lowest common denominator kind of system, or the biggest claim system in whatever State dictating the terms and conditions of lawsuits that we do in product liability .

Now, I know the chamber is, and I am, an advocate of vast reform in the product liability tort laws that are not laws, but are simply accumulated from State to State based on court decisions.

It seems to me to be if not an identical, at least a parallel difficulty with the enormous burden of the system by resolving these claims under a tort system which, incidentally, while I do believe that the Wellington Group is a substantial step forward, it still has that overlay of the tort system.

Leaving that aside, do you see the product liability and asbestos as somehow parallel or why do you make the distinction between not doing anything in one, and needing to reform the other?

Mr. **Alter**. Let me split the parallel if I may.

Mr. **Bartlett**. OK.

Mr. **Alter**. In the case of tort liability, as we all know, we do not have uniform product liability laws. It is difficult for our members or anybody else, businessmen, to do business uniformly in the country. As a result of that, our advocacy, as some of you may well know, is for uniformity.

However, in the case of State workers' compensation systems, the movement toward uniformity or consistency is already taking place. And as I said, given the Federal Government's track record in compensation systems, federalization or the attempt to have Federal uniformity, is counterindicated. It is counterindicated if nothing else by the track record.

So I think that if we need solution A in one case, why does solution A have to apply in a second or a third or a fourth case?

Mr. **Bartlett**. Why don't we take the broad question. It seems to me there are two issues in the asbestos decision. One is: Is it better, more fair, and less costly to use a comp system as opposed to a tort system for resolving asbestos cases?

BEST COPY AVAILABLE

Now, status quo is we are using the tort system and everybody loses—that's the status quo. And if changes aren't made and all 50 States can make those changes, do we continue to encourage the tort system as opposed to a comp system in asbestos cases?

The other question then is, what are the limits of the Federal Government's liability? Let me separate those out.

Do you think we ought to continue to pay asbestos cases using the tort system, or do you think that we ought to change that system?

Mr. ROTH. One thing that you well know is that there's nothing to prohibit claimants from filing under State workers' compensation for asbestos, but this is not happening.

Mr. BARTLETT. But the difference——

Mr. ROTH. Exactly. There's a pot of gold possibility there and it's a specialized bar that handles workers' compensation also. The current deliberations on the Senate side, which you are tracking, are leading into some interesting areas. Senator Danforth's initiative currently involves a binding arbitration alternative which would also include product liability cases for occupational disease. There is a lot of crossover but the critical distinction is that the problems are not with the State workers' compensation system. That's the point we are trying to make.

The other problems in the product liability tort area—the Senate has, as you know, been going out of their way to try to address them. So we feel there is a distinction between the two, without a doubt.

Mr. BARTLETT. Certainly you want to resolve the asbestos cases using the tort system, or if you could write the system, would you think it would be better that we move toward a compensation system or toward a tort system?

Mr. ALTER. I think fairness would dictate that we move toward a compensation system. I think the Wellington system has many advantages in the way in which to go. I say move toward the compensation system—to leave those who feel that they have not been compensated, to possibly leave that final appeal to the tort system.

I can't go into detail on this because this is not something that our members have examined in detail. But if I may add, I think the dynamics of the State legislatures' involvement in the policy process is that they are probably waiting for the Congress to do something—at least some State legislatures. I think we have all observed this. But why do they have to address it? The Congress is addressing it.

Perhaps the same as the business community, including the insurance industry, has been pleading with the States to reform at their level, perhaps we can get more leadership if the Congress did the same thing. If the Congress said, look, folks, we have heard from all the expert panels. We have heard from expert panels of State commissioners, of the insurance people, of business people, the little guy who has to pay that workers' compensation premium—and I say has to, it is required by law. In addition to that, add the voice of Congress asking the State legislatures, look, this has been a State responsibility—exercise it, we are not going to do it for you. And maybe we would get those who are waiting for you to solve their problem, to do their own business. Maybe we can get them off their chairs to do it.

Mr. **Bartlett**. Maybe they will solve product liability for us, too.

Mr. **Alter**. Maybe.

Mr. **Bartlett**. Thank you, Mr. Chairman.

Mr. **Murphy**. Mr. Williams.

Mr. **Williams**. Thank you, Mr. Chairman.

Gentlemen, you have made relatively clear your specific objections to parts of the legislation.

Let me, rather than pursue those with you, because you have been clear, to see if I can pursue the Chamber's philosophy that drives that opposition.

Is occupational disease a national problem?

Mr. **Alter**. Sir, I think it is an international problem.

Mr. **Williams**. But in America, is it a national problem?

Mr. **Alter**. I hesitate in answering, Mr. Williams, because I think what we have is that the national government, through organizations like OSHA and NIOSH, have indeed addressed the prevention. Certainly, with the assistance of NIH, HHS, the National Government has addressed the treatment. Certainly, responsible manufacturers nationwide don't want occupational disease problems.

Now the question is who are those who are spurning the law and exposing their workers to these problems? Is that a national or is it a localized problem?

Further, I hesitate because it is a question of the disease, the prevention, the cure, the adherence to the laws and regulations, versus the administration of a compensation system, and that, we think, is a State responsibility.

Mr. **Williams**. Some problems in America's history have long been perceived as State problems until the difficulty became so great that it not only obviously flowed across State lines but was in fact creating a problem of such depth that it was touching so many people across America that it became a national problem. And the public then insisted that there be a national solution. For example, civil rights.

The great art which delayed the national solution on civil rights was that it was a State problem, and up went the banner called States' rights. The Federal Government took the side of that banner very heavily, not at all lightly, and refused for decades—in fact, more than a century—to try to impose a Federal solution until it became clear that State solutions were not possible. And that the genius of this system is that when a State solution isn't possible, the Federal Government moves in and applies a solution that is workable. And that is what's behind the heart of my question of has this yet become—and it's a reasonable question—has this problem become a national problem that can not be solved in fact by the States?

Mr. **Alter**. May I turn that around, please? Putting asbestos aside for the moment. Do we really know how broad a problem occupational disease is or diseases nationally?

Mr. Parker made the point of quoting somebody, or paraphrasing somebody, that asbestos may be a historical disease for the reasons he gave. Now let's look at other occupations. We have addressed black lung—hopefully we are addressing byssinosis. In the chemical and petroleum refining industry the epidemiology of the workers is that they are more healthy than the average American. This is not necessarily what they are breathing or drinking is healthy for them, but rather, the healthy worker syndrome.

We look at the statistics of cancer. If cancer is the disease that we are focusing on—such disease from occupational exposure has to be, statistics show, very, very small.

So what I say is that I don't know the answer to your question because I don't know the answer to the basic premise, which is, is there or is there not an epidemic of occupational disease through the country? And from my reading, I don't see one.

Now, if there's broad disagreement, I would very much like to know. But I just don't see it.

Mr. WILLIAMS. Is the current system of State compensation adequate to treat the problem at whatever epidemic degree it exists? The problem is obviously brought to you here today, and has caused, through several Congresses, the introduction and consideration of legislation. So we know there is a problem, and that it is of a significant magnitude.

The question is: In your judgment, are the States currently able to meet that problem, to whatever degree it exists? If not a national problem, all right, State problem.

Mr. ALTER. Most.

Mr. WILLIAMS. Pardon?

Mr. ALTER. Most States, in our judgment, are doing it, have been doing it, and changing to do it better, it has to be a dynamic system.

Mr. WILLIAMS. Our estimates are that 10 percent of the occupational disease are being compensated and then only after litigation. Is that adequate?

Mr. ALTER. Sir, that's a surprising number that I have never heard before, and it has a ring of incredulity to it. For example, we do know that there are many claims of occupational disease based on exposure, not on symptoms, impairment or disability.

As we point out in references in our testimony, in the case of asbestosis, two prominent thoracic surgeons testified before Congress that the diagnostic procedures were inadequate.

Now, certainly somebody came up and said, I have a claim; somebody said you are entitled to compensation, and somewhere along the line a physician did not make an adequate diagnosis. We have heard a lot about that in black lung over the years, and the GAO, among others, has written about it extensively.

So it is a question of the number of compensations—the claims and the causation, to go back to what I said before about causation. What is the diagnosis? And is the diagnosis due solely to that—occupational exposure? Is there truly a disease?

When I examined the literature on this, when I talked to our members on this, these are the questions that keep coming up.

Mr. WILLIAMS. I understand and appreciate your answer.

Mr. Chairman, this is a serious issue. I tend to think the problem is national in scope and requires a Federal application in order to resolve it in the best interests, first of the workers, and then of the companies, companies that are not now absorbing the cost except as they are required to do so through court action.

The marketplace, it seems to me, is the appropriate place for the payment of these costs, not the courtroom, but the marketplace. I should think that the national chamber would agree with that.

Finally, Mr. Chairman, because this is a serious problem, regardless of where the application is placed at the State and the Federal level, it really doesn't do the process any good for the chamber to have a position that the Federal Government should not meddle, and that instead we should simply tell the States that it is their responsibility in the hopes that they will finally do so.

Mr. Chairman, they won't do anything because they can't. It's a national problem and has reached such depths that it's beyond the States.

The corporations have two choices: they can take a Federal solution or they can continue to go through court and file bankruptcy. The Congress, it seems to me, offers the workers their only choice, and that is to be adequately compensated for the diseases they get as a result of their job.

Mr. **Alter**. Mr. Chairman, may I add a remark to that, please?

The chamber would agree with Mr. Williams—it certainly is the marketplace solution and indeed our members participate in that.

I point out that our members are the payers of the workers' compensation premiums, that our members have paid larger and/or paying, and probably will pay larger and larger premiums. Our members pay their share of things like the Social Security payroll tax which goes to help pay some of these claims, and certainly it is our members who are paying the court costs. They are the ones who are going to court and their counsels do not work on contingency fees. So, indeed, our members are paying these costs.

As far as the States go, the dynamics of the State situation, the statistics show that the change is happening and that the workers are being compensated, although the system is not perfect.

If this Congress, or any other Congress, can come up with a system that is perfect, or believes is perfect, we would certainly enjoy sitting down and examining that system.

We are looking at a State system that has evolved over the years, that dynamic means improvement. It means that one of the 50 States, or the 56 systems, can point to any of the others and say, you are ahead or you are behind, we have a system that is self-improving. I think that has a lot of merit to it.

So I would suggest, if I may, please, Mr. Williams, that national or not, we have a number of systems that are working, that are changing to be responsive, and can be responsive to claims based upon true causation rather than any clarion calls that there is a big problem without the establishment of causation.

Mr. **Murphy**. Thank you, Doctor.

The next panel of witnesses represent the American Insurance Association and Alliance of American Insurers, Mr. Charles Coakley, and Mr. Tom O'Day.

Mr. Coakley, you have been with us before, at the first asbestos hearing. Thank you for coming back.

STATEMENTS OF CHARLES COAKLEY, SENIOR COUNSEL, AMERICAN INSURANCE ASSOCIATION, AND TOM O'DAY, ASSISTANT VICE PRESIDENT, ALLIANCE OF AMERICAN INSURERS

Mr. **Coakley**. I am happy to be here, Mr. Chairman. Unfortunately, I do not come today with a prepared statement. I was away last week and I learned about this hearing on Monday. I am going out of the country tomorrow for 2 weeks and I have been trying to do 3 weeks work in 1 week, and you never seem to get it done.

Mr. O'Day has a prepared statement. I would ask that he go first and then I will make some comments from notes that I have and when I get back I will be happy to submit a written statement.

Mr. **Murphy**. Thank you very much. Mr. O'Day.

Mr. **O'Day**. Good morning, Mr. Chairman.

I haven't had the pleasure of appearing before you. I have appeared before some of your predecessors, and my association has appeared here many times on this and related subjects.

I will quickly summarize some of the points that we make in the much larger statement that you have. I hope you will take time to read it because it answers some of the questions that were posed earlier today, some of the things that are quite important in the discussion that you have here.

My name is Tom O'Day and I am the assistant vice president of the Alliance of American Insurers, whose members play a major role in providing workers compensation to American companies across the United States.

We appreciate this opportunity to testify and present our views on occupational disease. Without question, this subject has been the object of much examination and explanation, discussion, criticism, and debate in almost every type of form for the past several years.

The alliance is here today in strong opposition to H.R. 3090. We view it as an unnecessary, and worst than that, harmful Federal intervention into an area best handled by the States. We hope our testimony will assist in dispelling some of the misperceptions—the half truths surrounding occupational disease and its handling by the State workers compensation systems.

I would particularly like to touch upon some of the previous estimates that have been used by both Government and others which have created an unfair benchmark from which to gauge the ability of State workers compensation to handle occupational disease.

In our statement we mention several estimates and we go into a lot of detail. We cite renowned authorities, two of which the Congress designated to make a detailed study about this several years ago. I would say it's a shame the Congress has not brought these researchers here and discussed with them the findings of their research. These are Doctors Doll and Peto who did a monumental study for the Office of Technology Assessment.

I will not take the time to spell them out but basically we believe, as do many others, that these estimates—some that Mr. Williams cites—are wrong by a factor of at least 10, maybe more. They are exaggerating the problem of occupational disease by at least 10 times. However, even 10,000, or 1,000, or 5,000, any guess is still a problem. But you do need a fair benchmark if you are going to judge the ability of State workers compensation to handle occupational disease. The system is not perfect. But the States are working and making the corrections that are necessary.

It is important for the States to do this because it is these people who are going to have to bear the burden of administering the system and the costs of handling these cases as they come forward.

If the Federal Government or any other body, interferes with that process, what you will have is an unnecessary intrusion which does not help the problem but, instead, worsens it.

The best example of such intrusion that we have had in our history, and one that is constantly referred to, is the black lung experience—and I think you are well aware of that.

Another unfair criticism of the State workers compensation comes from what is happening in the asbestos product liability area—and I stress the word liability. There is an obvious problem there as the tens of thousands of cases in the courts prove. But it is not related to workers compensation.

The fact that there is a product liability problem related to asbestos does not in any way—and I stress again the words any way—indicate that there is a failure of State workers compensation. You have heard others say this. And I stress it again and again. You are talking about two different things and you are mixing them up, and when you mix them up you are going to come up with the wrong conclusions.

As previous witnesses have testified, some 50 percent of these cases come from the shipyard involvement with the Federal Government. The shipyards at that time were, and still are, covered by Federal compensation acts. These acts are not bringing in the workers compensation claims. They are considered as some of the most generous acts in terms of providing workers compensation to injured workers. Yet, the fact is that most of these people who have an asbestos case have chosen not to file workers compensation. Why have they done this? There's a variety of explanations. There's no simple explanation to this.

Probably the best one is that they are seeking the promise of the expectation of higher awards. There's a recent story, I think in Business Week, talking about the casino society. This is the million dollar jackpot under product liability. Some have even been advised, we have been told, not to seek workers compensation, to maybe claim Social Security disability.

The difference between these two compensation systems is there is no offset as your bill would require, Mr. Williams, if you are paid under Social Security disability. If it is paid under State workers compensation or under Federal workers compensation, there is an offset of whatever you have been paid under workers compensation in terms of your product liability award.

There is also the fact that if you claim workers compensation you are going to be subject to examination. You are going to have to show a causal link between your workplace exposure and the disease. You are going to have to show you are disabled. It's a fair test—one that is necessary or otherwise you are saddling industry with all the ills of society.

That is what we saw happening in the Black Lung program. The Black Lung program, when it was originally set up, would have only paid people that were disabled from the workplace, the mines. It started to do that. There was an expectation that it should have paid more people. And so the act was changed rather quickly, in fact, we can often say the ink was hardly dry on the original enactment before they started changing it.

The first prediction was that it would have just cost a few hundred million dollars. And maybe that is what it would have cost if it had stayed as it was originally enacted. However, it was not paying the people that it was expected to pay. Again, the unfair benchmark. So it was changed. It now costs some $2 billion every year.

This is a perfect example of what happens when you have an unfair benchmark. If you expect that there are tens, or hundreds of thousands of people being injured by occupational disease, and if you set up a system—State, Federal, New England, it doesn't make any difference where it is—and if the benchmark is incorrect, then you are going to have to change that system quickly. You are going to be under tremendous political pressures to do so in order to meet the expectations of people that they should be compensated. You said that they were, you know, being injured, and they should be compensated.

Finally, I would say that we agree with others, that the State system is where we should be. And if there are things that need to be changed—and there are things that need to be changed—they should be changed by the local people. The business community, organized labor, and the insurance industry, need to work together. These are the key players in workers compensation. If one of them is missing from working on correcting the problems, then it is very difficult for the remaining two to correct the problem.

We find that there is a certain reluctance on at least one part of that group to address problems at the State level, and I am speaking specifically of organized labor. They seem to seek a Federal correction to all problems.

We welcome them to sit down with us and work. They have been invited. They do attend sometimes, but it is a mixed bag. Most importantly, if the system is to continue as it has in the past, if it is to be improved, all the players must be there, and they must continue to work together.

Again, I thank you for allowing us to be heard. I will be happy to answer any questions.

Mr. MURPHY. Thank you.

[The prepared statement of Tom O'Day follows:]

PREPARED STATEMENT OF TOM O'DAY ON BEHALF OF THE ALLIANCE OF AMERICAN INSURERS

HIGHLIGHTS OF ALLIANCE STATEMENT

Some previous exaggerated estimates of the size of occupational disease have created an unfair benchmark against which the ability of state workers compensation laws to cope with the problem is often measured. (Pages 1-6)

These alarmist studies are probably wrong by at least a factor of 10 times too large. (Pages 6-7)

The fact that asbestos claimants are pursuring tort actions instead of workers compensation is no indication whatsoever of the ability of the systems to handle occupational disease. (Pages 8-9)

Studies indicate that when workers compensation claims related to asbestos are filed, a very high percentage of claimants receive benefits. (Page 10)

State workers compensatoin programs do cover diseases related to employment. (Pages 12-13)

Where problems exist in the state system, local business people are trying to deal with them. (Pages 14-15)

The Alliance opposes any federalization of state workers compensation, such as H.R. 3090, since no rational case can be made to justify such a major intrustion by the federal government. (Pages 15-17)

My name is Tom O'Day and I am Assistant Vice President of the Alliance of American Insurers. We are a major association of property and casualty insurance companies. Our member companies write workers compensation insurance in all 50 states and the District of Columbia. Some of our members are among the largest workers compensation insurers in this country. Many were organized specifically to provide this type of insurance coverage. A number of companies have gained an international reputation for their pioneering work performed in the related fields of occupational health and safety, occupational medicine and rehabilitation.

Alliance companies underwrite about 22% of the workers compensation business in this country, and this line of insurance represents a major portion of the entire insurance business written by our companies. This explains why the Alliance has traditionally been so deeply involved in any discussions of workers compensation reform.

We appreciate this opportunity to testify and present our views on occupational disease issues. And, our opposition to H.R. 3090, the Federal Occupational Disease Compensation Act of 1985. Without question, occupational disease, particularly asbestosis, has been the subject of examination, explanation, discussion, criticism and debate in every type of forum over the past several years. We hope that this hearing and our testimony will materially assist in dispelling some of the misperceptions surrounding "occupational disease" and its handling by the state workers compensation system.

The workers compensation occupational disease problem in perspective

The state workers compensation system is being subjected to an increasing number of attacks on its ability to effectively compensate diseases arising out of and in the course of employment. Some critics of the system perceive occupational disease to be a serious threat to the continued viability of state workers compensation and even to its survival. We submit that the evidence cited in support of this contention is, at its best, open to serious question.

The handling of occupational disease claims under state workers compensation laws began to come under heavy criticism upon the publicaton of a National Institute for Occupational Safety and Health report filed with the Occupational Safety and Health Administration in September, 1978. That report projected that perhaps as much as 38% of all cancer mortalities were directly related to six known carcinogens often found in the workplace. The report was, and continues to be, used extensively to create a sense of a pending national crisis. Former HEW Secretary Joseph Califano repeatedly stressed the report's conclusions on television appearances and in press conferences.

One of the more popular misconceptions which emerged at that time, and continues to persist was that perhaps as many as 100,000 deaths per year result from occupationally related diseases. Despite the shallowness of the derivation of that figure, the number acquired great acceptance following its use by Secretary Califano in a much publicized television appearance.

At various public forums and in the media, speakers and writers made broad pronouncements of impending financial disaster. Alarming statistics on the number of workers disabled from asbestos, occupational cancers or some other occupational disease were always included. In most cases, the critics concluded that the state workers compensation system, and in some instances, the tort system, was failing to compensate victims of occupational disease.

However, the occupational mortality estimates which led to the conclusions are open to serious question. Doctors Peter S. Barth and H. Allan Hunt of the Department of Economics, University of Connecticut, were given the following explanations by NIOSH on how the estimate was reached.

"The approach taken to arrive at this estimate consisted of examining overall mortality rates for persons employed in a wide variety of occupations, and relating them to the mortality rate of the general populatin, taking into consideration age and relative social-economic level. The data source utilized in the process was the 1951 Registrar-General's Occupational Mortality Report for England and Wales,

BEST COPY AVAILABLE

which is the only source currently available with sufficient detailed information From this compendium, occupational groups whose mortality rates were greater than the general population rate (after adjustment for age and social class) were counted as having an excess death rate attributable to the environment in which they work. The number of deaths over and above those which would have been expected on the basis of age and social class were summed up over all occupations and treated as occupational disease deaths. This figure was then divided by the total number of occupational disease deaths that might be expected annually in this country, this rate was applied to a recent estimate of the number of employed persons in the United States. The result of this procedure yielded an estimate of 75,000. If one ignores social class in the calculations, the estimate would be 100,000."

Doctors Barth and Hunt were quick to point out the limited relevance to the U.S. of the British experience; to the "potentially serious estimating difficulties" arising from differences between the two countries; and to the "myriad issues that one should raise with respect to a 1951 report on occupational mortality rates." Yet, the discredited mortality rate projection persists.

Another explanation of the "100,000 death case" figure was provided by William J. McCarville, Director, Environmental Affairs, Monsanto, to the House Committee on Education and Labor. In this instance, he indicated that NIOSH sought a different rationale to support its quantification. There, NIOSH relied on the ratio of violent to non-violent deaths in underground metal and uranium mines and in smelting plants. Oddly enough, NIOSH assumes that "all non-violent deaths of everyone who works in industry are caused by work-related factors."

Another source being used in the public press as a basis for quantification of the occupational disease problem is the Department of Labor's Interim Report to the Congress on Occupational Disease. The first chapter of the report discusses the magnitude and severity of occupationally related diseases. This chapter begins by giving all the necessary qualifiers needed when making estimates of occupational diseases. It then surveys a number of studies on substances about which some occupational connection appears to be supportable. The qualifiers discussed previously are ignored, however. Finally, it proceeds to use social security data based on individual self perceptions as to the occupational connection with his/her condition. A masterful impact is achieved. The Department of Labor cannot be charged with ignoring the necessary qualifiers. The careful resort to epidemiological data (which may or may not be correctly used) leaves an impression of fairness because the report alleges a larger degree of exposure than that used for the exposed population in developing estimates of death. After leaving the impressions that it has taken into consideration the qualifiers and that it has faithfully looked at the scientific data and found that these data under-report the number of occupational disease cases, the report then turns to a 1972 Social Security Survey of Disabled and Nondisabled Adults ages 20 to 64 which was updated in 1974. It uses Social Security data based on an individual's own perception as to the occupational connection with his or her condition. The groundwork laid leaves the impression that this study has scientific validity, when in fact, the study is based on subjective opinion from a survey which never was intended to gather information on occupational disease. To provide the data which the report uses, the study itself appears to have been subject to manipulation.

In their report for the Office of Technology Assessment, "The Cause of Cancer", Doctors Richard Doll and Richard Peto of Oxford University, are highly critical of the methods used by OSHA in reaching the estimates projected in its 1978 paper—particularly the disregard of both the amount of dose and the duration of exposure—which they believe results in increasing risk estimates by more than 10 times. Furthermore, they criticize the study for failing to consider personal characteristics that affect the risk of cancer, such as smoking and socio-economic status. In fact, Doll and Peto go so far as to characterize the OSHA report as having been written "for political rather than scientific purposes, and it will undoubtedly continue in the future as in the past to be used for political purposes by those who wish to emphasize the importance of occupational factors, including the Toxic Substances Strategy Committee in their 1980 report to the U.S. President as well as many newspaper articles and much scientific journalism." Doll and Peto suggest that the OSHA report should not be "regarded as a serious contribution to scientific thought" and that its findings should be "dismissed."

A similar problem exists relative to the incidence of disease arising out of exposures to asbestos. According to Dr. Irving J. Selikoff, as many as 200,000 surviving workers who have been exposed to asbestos in the past 40 years will die of asbestos-associated cancer by the end of the century. The report goes on to say that approximately 8,500 asbestos related cancer deaths today are appearing annually among workers who were exposed to asbestos since 1940, and that this will rise to about 10,000 by the year 1990.

Dr. Selikoff's analysis is also sharply challenged in the Doll and Peto report. These researchers, working on a contract for an arm of Congress itself, dissect the arguments used by Dr. Selikoff is wrong by at least a factor of 10.

Drs. Doll and Peto are not alone in criticizing the Selikoff estimates. At a conference held in 1981 at the Cold Spring Harbor Laboratory, panelists using a variety of epidemiological approaches estimated that the proportion of U.S. cancer deaths currently due to asbestos is around 1 to 2% rather than the 13 to 18% projected by Dr. Selikoff. Incidentally, there was no dissent from this consensus even though a number of Dr. Selikoff's co-workers present at the conference.

It is extremely important to place the occupational disease projections by NIOSH and other critics in proper perspective since they remain as an unfair benchmark against which the ability of state workers compensation laws to cope with occupational diseases is often measured.

Obviously, if these projections are off by a factor of 10, the number of compensable occupational disease claims flowing through our workers compensation system would be nowhere near the quantity estimated by system critics. We strongly believe public policy must be based on the best available research estimate of the scope of the problem.

Tort problem does not indicate workers compensation failure

It has been alleged by some critics of workers compensation that the relatively small number of asbestos claims picked up by the system is, of itself, an indicator of the system's failure. In our opinion, this is a conclusion reached without adequate cause and effect justification.

The fact is that the major asbestos exposures occurred on ship construction in occupations covered primarily by federal laws: the Federal Employee Compensation Act and the Longshoremen's and Harbor Workers' Compensation Act. There are few, if any, barriers to asbestos claims under either of these two federal Acts. Their benefit systems are more than adequate. Yet, there are few asbestos claims filed under these programs.

A similar situation exists in California, where the state established a special asbestos workers compensation fund to cut through alleged red tape and provide benefits to asbestos-related victims on a "no fuss" basis. Payment of these benefits would not, in any way, preclude victims from pursuing either their workers compensation remedies or their tort liability remedies, or in fact both. What has been the result? The flood of claims anticipated has not materialized. Let me emphasize that California is one of the states that has experienced one of the widest occupational exposures to asbestos.

Why no claims? In our testimony before the House Labor Standards Subcommittee of the previous Congress, we described in some detail the reasons we believe asbestos victims are more likely to pursue product liability remedies than their workers compensation benefits—even though under all workers compensation laws, they would be entitled to seek both product liability and workers compensation benefits, with workers compensation benefits being offset against the product recovery.

To understand the present liability system and our workers compensation system, one needs to recognize that historically the responsibility for any work injury or disease caused by the negligence of anyone other than the employer or the employee has been the ultimate responsibility of the tort liability system. This long standing public policy has consistently received support at both state and federal levels. Now, there are some critics that would charge that the state workers compensation system is not accommodating occupational disease claims, because of problems in the tort system.

However, we believe the state workers compensation systems do have the capability to cope with asbestos related problems as well as other occupational diseases. Studies indicate that when workers compensation claims related to asbestos are filed, claimants do receive benefits. An analysis of the data presented in Dr. Selikoff's report to the Labor Department, for example, indicates that 80% of the claimants who had disability claims were compensated. As for death claims, Dr. Selikoff admits to a very high percentage of benefits being awarded, measured against claims filed. While his report summary only makes a general statement that almost all of those who filed for death benefits received such benefits, one must dig into the report to find a ratio of cases in which benefits were paid. Excluding pending but unresolved claims, 93% of those that filed for death benefits received such benefits. Including the pending claims, 85% of death claims filed received workers compensation benefits.

We believe, however, that there may be a number of reasons a claimant or an attorney pursuing a third party liability action for asbestosis chooses not to file for workers compensation benefits at the same time. For instance:

There are some who believe that pursuing a workers compensation claim exposes the claimant to a variety of medical examinations which the attorney for the product liability claimant would just as soon avoid.

The presence of a workers compensation lien can be an obstacle to settlement of a third party liability claim. The lien would certainly affect the fee which the attorney for the claimant in the liability cases would receive.

One obvious reason is the disparity in the application of the social security disability benefit law offset against workers compensation beenfits and other benefit systems. The offset penalizes the claimant who files for workers compensation benefits since filing for such benefits may lead to reduction in social security benefits. No such reduction applies when a claimant recovers in a products liability tort suit.

It is difficult to estimate the comparative number of claimants filing for recovery under the workers compensation as against the tort liability system. Nevertheless, we believe that there are at least ten asbestos related product liability claims filed for every one workers compensation claim. When one assesses the extent to which asbestos related diseases are compensated, these product liability claims must be taken into consideration.

We cannot overemphasize the fact that the relatively small number of asbestos claims in the workers compensation system is no indication whatsoever of the ability of the compensation system to cope with occupational disease. Let us face reality! Victims of asbestos-related exposures have turned directly to the liability system as a preferred compensation mechanism for one or all of a number of reasons. Possibly most important is the expectation of "higher awards" which sometimes come under the tort system.

State laws and occupational disease

The Capacity of the state to accommodate occupational disease has significantly increased since the days when occupational diseases were defined and included with scheduled injuries. Diseases not listed were barred from coverage. While some of this still persists in the form of specific disease provisions in some of the state laws, today, all states provide full coverage for occupational disease.

However, there are frequent allegations that some statutes effectively bar payment for occupational disease. We believe that those making such statetments are misinformed. Appendix I provides a state-by-state anlaysis of occupational statutes of limitations, ruling court decisions affecting occupational disease statutes of limitations and appropriate excerpts from state laws. While there still remain a few states with rigid limitations, in most states the statute of limitation in disease cases does not begin to run until the discovery of the relationship between a disease and employment.

Of course, for a disease to be compensable under state workers compensation laws, it must be related to employment. If the government wants to require a disease to be covered under workers compensation laws, whether or not that disease is related to employment, it can do so by legislative fiat—through the establishment of unwarranted presumptions. However, these legislative fiats do not make the disease itself occupational. Few state legislative bodies, other than the federal government, have dictated such coverages.

The Department of Labor, in its Interim Report on Occupational Diseases uses another approach to disparage the role played by workers compensation laws in relation to occupational disease. It attempts to show that the number of diseased claimants receiving workers compensation benefits bears little or no relationship to the number of workers it has identified (in a prior chapter) as being disabled from an occupational disease. Further, the Department alleges that the benefits being paid to those that do manage to work through the system are grossly inadequate.

One of the major sources used by the Department of Labor in its Interim Report to assess the effect of workers compensation laws in occupational disease situations was a workers compensation closed claim survey done for the Inter-Departmental Task Force on Workers Compensation. Unfortunately, this source does not provide reliable data regarding occupational diseases.

We do not claim that there are no problems associated with occupational disease and the workers compensation system. Certain occupational diseases with long latency periods and complex multiple or unknown etiology do cause unique problems for the system. Today, many substances found in the workplace are being viewed as potential health hazards. The medical impacts of these health hazards over time are unknown.

More important, however, is the states' ability to respond to the problem once they are identified. We would cite the following as some examples of the activities presently underway involving the states. The U.S. Chamber of Commerce policy statement recommending to its members "that appropriate reforms of state occupational disease laws be supported where needed and that its members further use their best efforts to facilitate the enactment of these reforms." The Crum and Foster Insurance groups report on the "Role of Workers Compensation System in Compensating Occupational Disease Victims". Although we do not support everything contained in that report, it has served as a catalyst to sharpen the focus on the state workers compensation system's handling of occupational disease. Also, at the present time there is a broad based Advisory Committee on Occupational Disease preparing a report for the National Association of Insurance Commissioners. The full Advisory Committee has representatives of employers and employer groups, organized labor, insurance companies and insurance trade association and state workers compensation administrators all considering the issues involved with occupational disease.

A Federal program is not the answer

We take serious issue with those who conclude that a federal solution is the only answer to the occupational disease problem. In prior testimony before this Congress, we have expressed our staunch opposition to the federalization of state workers compensation laws as well as federal intervention of any sort. The horrendous experience that the nation has had with the Black Lung experiment underscores our concerns.

Moreover, we do not understand why the state workers compensation system should be federalized because of problems in the tort sytem.

We concur with former Congressman John Erlenborn's observation on a previous House bill aimed at an asbestos solution. In his remarks, Mr. Erlenborn said that the asbestos problem is a manifestation of "not so much a workers compensation failure, as the Chairman's bill assumes, but a products liability failure—and, therefore, the remedy should be in amending our product liability laws—not using that failure to advance an agenda of federalizing workers compensation."

The role of the state workers compensation system as the primary method of recovery in cases which also involve a cause of action based on products liability, has been recognized in a bill (S. 100) before the Senate Commerce Committee.

This bill entitled the "Product Liability Act", would establish a uniform federal law for all states with respect to product liability litigation. While it is not the purpose of these hearings to undertake a detailed analysis of this pending legislation, it is appropriate to note the manner in which it deals with the role of workers compensation in cases based upon a products liability theory of action.

This bill provides that when a claimant obtains a judgment based upon a products liability cause of action, the amount of that judgment will be reduced by the sum of the amount paid as workers compensation benefits for the claimant's injury and the present value of all workers compensation benefits to which the claimant is or would be entitled for the injury. The legislation also preserves the exclusiveness of remedy doctrine presently contained in all state workers compensation laws.

Thus, this proposal recognizes that in situations in which a work-connected injury may also result in a third party action based upon a theory of products liability, the primary responsibility for compensation rests upon the workers compensation system.

The entire "Product Liability Act" is receiving widespread support from the business community as being an equitable balance between the rights of injured claimants and products manufacturers and sellers.

The Alliance supports the business community in its efforts to secure this equitable balance, which enforces the concepts contained in this proposal.

CONCLUSION

In conclusion, we agree that some problems indeed exist in the state workers compensation system. However, there is ample evidence that these problems are being dealt with by the states.

We see no necessity for a federal program such as H.R. 3090. Based on the experience with Black Lung, the evidence is clear that federal intervention makes the problem worse. For these and other reasons, we strongly disagree with those who call for a federal solution to a problem which can be better handled by the states.

APPENDIX 1

9/85

OCCUPATIONAL DISEASE STATUTES OF LIMITATIONS

Alabama

Section 25-5-117 + 25-5-147. For occupational diseases other than radiation and coal miners pneumoconiosis, a claim must be filed within one year from date of injury, last payment, death, or removal of mental incapacity. In case of death, the death must also result proximately from the occupational disease and occur within three years of the date of injury. The date of injury means the last exposure to the hazard of the disease.

Section 25-5-178. For coal miners pneumoconiosis, a claim must be filed within three years after the discovery of the total disability, date of death, or last payment.

Section 25-5-197. In the case of exposure to radiation, all claims for compensation must be filed within one year after the employee first suffered disability and then knew or in the exercise of reasonable diligence should have known the disability was caused from an occupational disease, but in no event more than three years after the date of injury, or one year after last payment or removal of mental incapacity. Death provision is the same as above. Date of injury is the date of last exposure to the hazards of radiation in the employment of the employer where employee was last exposed, within a period of five years prior to the date of the injury, to the hazards of radiation in each of at least twelve months.

Alaska

Section 23.30.105. A claim must be filed within two years after employee has knowledge of the nature of his disability and its relation to his employment and after disablement; one year after death; and two years after last payment in either case. For injury cases, a maximum of four years after date of injury. In addition, in the case of latent defects pertinent to and causing compensable disability, the injured employee has full right to claim as determined by the board, time limitations notwithstanding.

Arizona

Section 23-1061. A claim must be filed within one year after the injury occurred or the right thereto accrued. The time for filing a compensation claim begins to run when the injury becomes manifest or when the claimant knows or in the exercise of reasonable diligence should have known that he/she sustained a compensable injury. Delay is excused for justifiable reliance on a material representation by the commission, employer or insurance company or if the employee is insane, incapacitated, or legally incompetent. The claim is not barred if compensation has commenced.

Arkansas

Section 81-1318. In injury cases, the claim must be filed within two years after the injury or death. In occupational disease or occupational infection cases, a claim must be filed within two years after the date of last injurious exposure to the hazards of the disease or infection. In the case of silicosis or asbestosis the claim must be filed within one year after the date of disablement and such disablement must occur within three years of the date of the last injurious exposure. In the case of diseases caused by exposure to X-rays, radioactive substances, or ionizing radiation, a claim must be filed within two years from the date such condition is made known to an employee following examination and diagnosis by a doctor.

California

Sections 5405 and 5406. A claim must be filed one year after injury, last payment or death. (In death cases, never more than 240 weeks after injury.)

Section 5412. The date of injury in cases of occupational diseases or cumulative injuries is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment.

Colorado

Section 8-52-105. All claims but those resulting from causes listed below, must be filed within three years of the date of injury or death resulting therefrom. This limitation does not apply to any claimant to whom compensation has been paid or, if within five years, it is established that a reasonable excuse exists for the failure to file notice and the employer's rights have not been prejudiced by the failure.

In cases of disability or death resulting from exposure to radioactive materials, or any type of malignancy caused thereby, or from poisoning by uranium or its compounds, or from asbestos, silicosis, or antracosis, a claim must be filed within five years after the commencement of disability or death.

Connecticut

Section 31-294. Claims must be filed within one year of date of accident or within three years from the first manifestation of a symptom of the occupational disease.

If death has resulted within two years from the date of accident or the first manifestation of a symptom of the occupational disease, a claim must be filed within such two year period or within one year from the date of death, whichever is later.

This provision is not acceptable if there has been a hearing or a written request for hearing or an assignment for a hearing, or if a voluntary agreement has been submitted within the above time, or if the employer has furnished the employee with medical or surgical care.

Delaware

Section 2361. For injury, the claim must be filed within two years after the date of accident or death.

For occupational disease or ionizing radiation injury, the claim must be filed within one year after the date of employee's first knowledge that the disability was or could have been caused or resulted from the employment. In case of death, claim must be filed within one year after the date on which the person filing knows or by reasonable diligence should have known of the possible relationship of the death to the employment.

District of Columbia

Section 13(a). Claim must be filed within one year after accident, last payment or death. The time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware of the relationship between the injury or death and the employment.

Florida

Section 440.19. A claim must be filed within two years after injury, death, last payment, or remedial treatment.

Section 440.151. To be compensable death due to occupational disease must follow continuous compensable disability and occur within 350 weeks from last exposure.

Georgia

Section 114-305. A claim must be filed within one year after injury, death or remedial treatment or two years after the last payment of weekly benefits. In radiation cases only, claim must be filed within one year after employee knew or should have known that disability was due to employment.

Section 114-801. Disablement or death due to occupational disease must occur within three years of last exposure in the case of silicosis, asbestosis or byssinosis; one year for all other diseases. Death may occur within seven years if it follows compensable disability. Does not pertain to radiation.

Hawaii

Section 386-82. A claim must be filed within two years after the date on which the effect of the injury becomes manifest, but not longer than five years after date of accident or occurrence causing injury.

For injury caused by compressed air to occupational exposure to or contact with, arsonic, asbestos, benzol, beryllium, zirconium, cadmium, chrome, lead, flourine, or other mineral or substance with carcinogenic properties, as incorporated in the Hawaiian occupational safety and health standards, or to exposure to X-rays, radium, ionizing radiation or radioactive substances, claims must be filed within two years after knowledge that the disease was approximately caused by, or resulted from the nature of the employment.

Claim requirement waived if payments of income and indemnity benefits have been made voluntarily by the employer.

Idaho

Section 72-701. A claim for injury must be filed within one year after accident or death. Requirement waived if payments of compensation have been made voluntary or if a hearing request has been filed.

Sections 72-439 and 72-448. For occupational diseases, except radiation diseases and silicosis, the claim must be filed within one year after manifestation of the disease. For radiation diseases and "other unusual cases of occupational diseases," a claim must be filed within one year after the date upon which the employee first suffered incapacity, disability or death and knew or in the exercise of reasonable diligence should have known that it was caused by his present or prior employment. Disablement or death must result within one year after the last injurious exposure to the disease or, in case of death, unless death follows continuous disability from such disease commencing within the period above.

For silicosis only, disablement or death must result within four years after last exposure; a claim must be made within that time.

Illinois

Section 172.36(f). In a claim for occupational disease, disablement must occur within two years of last exposure, except in the cases of disease caused by berylliosis, silica or asbestos dust disability must occur within 3 years.

Section 172.41(c). A claim for disability due to an occupational disease, except for exposure to radiological material or equipment, must be filed within three years after injury or disablement if no compensation has been paid; or two years after the last payment.

BEST COPY AVAILABLE

For death, the claim must be filed within three years after the date of death or within three years after the last payment of compensation. In cases of disability from coal miners pneumoconiosis, a claim must be filed within five years after the last payment.

In cases of disability caused by exposure to asbestos (effective 7/1/84), radiological materials or equipment, a claim must be filed with the commission within twenty-five years after the last date employee was employed in an environment of hazardous radiological activity. In case of death occurring within twenty-five years, the claim must be filed within three years after the date of death or last payment.

Indiana

Section 22-3-3. A claim for injury must be filed within two years after injury or death, except in the case where injury or death results from exposure to radiation, the claim must be filed within two years from the date on which the employee had knowledge of his injury or by exercise of reasonable diligence should have known of the existence of such injury and its causal relationship to the employment.

Section 22-3-7-32. In occupational disease claims, the claim must be filed within two years after disablement or death.

Sections 22-3-7-9 and 22-3-7-10. Disablement must occur within two years of last exposure, except for silica and coal, for which disablement must occur three years after last exposure, or asbestos, for which it is 20 years. Death must occur two years after disablement with a couple of exceptions. Does not apply to radiation diseases.

Iowa

Sections 85.23 and 85.26. In the case of injury, the employer must have actual knowledge of an injury or be given notice within ninety days of the date of occurrence or no compensation will be allowed. A claim must be filed within two years after the date of injury.

Sections 85A.12, 85A.16 and 85A.18. The time limitations for occupational disease, except for injury due to radiation, is the same as for injury, except that the period begins to run at the first distinct manifestation of the disease or at the time of death. Disablement or death must occur within three years after the last injurious exposure in the case of pneumoconiosis or within one year for other occupational diseases.

In the case of radiation illnesses, the claim must be filed within ninety days after disability or death or after the employee had knowledge, or by exercise of reasonable diligence should have known, his disablement was caused by the employment.

Kansas

Section 44-520. In injury cases, a claim must be filed within two hundred days of the accident or last payment, and one year after death.

Sections 44-5(a)01 and 44-5(a)17. In occupational disease cases, a claim must be filed within one year of the date of disablement or death; may be waived if payment is made or employee is led to believe notice or claim has been waived. For radiation disease, a claim must be filed within one year from the date employee first suffered incapacity and either knew or in the exercise of reasonable diligence should have known that the occupational disease was caused by present or prior employment.

Except for silicosis, disablement and death must occur within one year from last injurious exposure, unless death follows continuous disability which commenced within the time limitations and occurred within seven years from last exposure. In the case of silicosis, disablement must occur within one year, and death within three years after last exposure unless it follows continuous disability and occurs within seven years after last exposure.

Kentucky

Section 342-185. In injury cases, a claim must be filed within two years after the date of injury or death. Where payments are suspended, a claim must be filed within one year of suspension or two years after date of accident, whichever is later.

Section 342-316. In occupational disease cases, a claim must be filed three years after the last injurious exposure or the first distinct manifestation of an occupational disease in the form of symptoms reasonably sufficient to appraise him of the disease, or death. However, any claim must be filed within five years from the last injurious exposure except for radiation diseases, which must be filed within twenty years from the last injurious exposure.

Louisiana

Section 1209. A claim for injury must be filed within one year after the accident, death or last payment, except in cases of partial disability which must be filed within one year after accident or death, or three years after last payment. For delayed injury, a complaint must be filed within one year from the time the injury develops, but no more than two years after the date of the accident.

Section 1031.1. For occupational disease, a claim must be filed with the employer within six months of the first manifestation, disability, and knowledge of occupational relationship. In death cases, a claim with the manufacturer must be filed within six months of death. This notice constitutes a claim.

Maine

Sections 63 and 95. A notice of the injury must be given to the employer within thirty days after the injury or three months after death. Failure to do so by reason of physical or mental incapacity or mistake of fact tolls the time. A claim must be filed within two years after injury or last payment. If employee is prevented from filing claim by physical or mental incapacitation or mistake of fact as to cause or nature of injury, claim may be filed within reasonable time, but not more than ten years after last payment.

Sections 186, 187, 189, 194 and 195. For occupational diseases, notice and claim shall be made as above, except that date of incapacity shall be taken as the date of injury. For incapacity due to occupational diseases, the incapacity must result within three years after the last injurious exposure.

For radiation diseases, the time for filing claims does not begin to run until the person claiming benefits knew, or by exercise of reasonable diligence should have known of the causal relationship between the employment and the incapacity.

Maryland

Section 49. In injury cases, a claim should be filed within 60 days of the date of injury, unless excused by the commission; however, the claim must be made within two years after date of injury, and within eighteen months after date of death. Claims for accident or injury from ionized radiation must be filed within two years of date of disablement or the date when the claimant first had knowledge that such disablement was due to ionizing radiation.

Section 26. In occupational disease cases, a claim must be filed within two years after date of disablement or death or the date when the employee or his dependents had actual knowledge that the disablement was caused by the employment; claim must be made within three years for pulmonary dust diseases. Requirement is waived in certain enumerated instances.

Massachusetts

Sections 41 and 49. The claim must be filed within one year after injury or death. Delay may be excused if occasioned by mistake or reasonable cause; if the insurer was not prejudiced; or if the insurer has executed a compensation agreement or has made payment for compensation.

Michigan

Section 418:381. For injuries, notice of the injury must be given to the employer within 90 days; a claim must be made within two years after the occurrence of an injury or after death. Time limitation is tolled by reason of physical or mental incapacity, and by the payment of benefits or sheltered work. In other cases, a claim must be made within two years of the later of the date of injury, the date of manifestation, or the last date of employment with the employer against whom the claim is made.

Section 418.441. Requirements for claiming death or disability for occupational disease are as above, except that the time period shall begin on the date the claimant had knowledge, or a reasonable belief, or through ordinary diligence could have discovered that the occupational disease or death was work related.

Minnesota

Section 176.151. A claim must be filed within three years of employer's report of injury or death to the Commissioner of Labor, but not over six years from the date of said injury or death.

In occupational disease cases, the above limitations do not apply, but the employee must give notice to the employer and commence his action with three years after the employee's knowledge of the cause and after the injury has resulted in disability.

Mississippi

Sections 71-3-3 and 71-3-35. A claim must be filed within two years after injury or death, or dismissal of suit at law because of coverage under the Act. In radiation cases only, the date of disablement, shall be treated as the date of the accident.

Missouri

Section 287-430. A claim must be filed within two years after injury, death, or employer's report of injury and if employer fails to file report, up to three years from the date of injury; provided that for other than occupational disease, a claim must be filed within five years from the injury or death.

Section 287-063. In occupational disease cases the above statute of limitations applies, but does not begin to run until it becomes reasonably discoverable and apparent that a compensable injury has been sustained.

Montana

Section 39-71-601. In injury cases, a claim for disability or death must be filed within twelve months of the date of injury; however, division may waive requirement for additional 24 months upon a reasonable showing by the claimant of lack of knowledge of disability.

Sections 39-72-403, 405 and 406. In occupational disease cases, a claim for disability must be filed within two years from the date of the claimant knew or should have known that the total disability condition resulted from an occupational disease. Claims for death benefits must be filed within two years from the date of the beneficiaries knew or should have known that the death was related to an occupational disease. For sufficient reason, the division may waive the claim time requirement up to an additional two years.

Nebraska

Section 48-137. All claims must be filed within two years after date of injury, death, last payment or removal of legal disability.

Nevada

Section 61.500. In injury cases, a claim must be filed within ninety days after the accident, or one year after death.

Section 617.330. In occupational disease cases, a claim must be filed within ninety days after the employee has knowledge of the disability and its relationship to employment or within one year after death occurred.

Sections 617.460 and 617.470. Claims for compensation on account of silicosis or any other dust disease of the respiratory tract shall be forever barred unless application is made to the commission within one year after temporary or total disability or within six months after death.

New Hampshire

Section 281:16 and 281:17. For injury and occupational diseases. Notice must be given to the employer within two years from the date of injury. However, in cases of diseases in which the nature of the disease and its relationship to the employment is not known to the employee, the time for filing notice shall not begin to run until the earlier of the date the employee knows, or by reasonable diligence should know, of the nature of the disease or its possible relationship to the employment, or, in the event of death, until the date any dependent knew or by reasonable diligence should have known, the nature of the disease or its relationship to the employment, whichever is earlier.

New Jersey

Sections 34:15-41 and 34:15-51. In injury cases, a claim must be filed within two years of the accident, death, default on payments, or last payment.

Section 34:15-34. There is no time limitation for filing occupational disease cases; provided, however, where the claimant knows the nature of the disability and its relation to the employment, a claim must be filed within two years of this knowledge, or default, or last payment.

New Mexico

Section 52-1-31. In injury cases a claim must be filed within one year after notice (which must be given a maximum sixty days after accident), death, or failure of employer to pay. Time limit tolled for a maximum of one year while in the same employment.

Section 52-3-16. In occupational disease cases, a claim must be filed within one year after beginning of disablement, death, or failure to pay. In radiation cases, the period does not begin to run until the employee: (1) sustained such injury or disability; and (2) knows, or by the exercise of reasonable diligence should have known, of the existence of the injury or disability and the possible relationship to employment. Failure to file timely may be excused if caused by employer or insurer's conduct in misleading claimant.

Section 52-3-10. For silicosis or asbestosis, disability or death must result within two years from the last day of work for the employer against whom the claim is made, or within five years--where death results during a period of continuous total disability for which compensation has been paid or awarded. For radiation illnesses, disablement or death must occur within ten years from when the employee worked for the employer against whom compensation is claimed. For all other diseases death must occur within one year of the last day of work.

New York

Sections 18, 28 and 40. In most cases, a claim must be filed within two years after accident or death, unless advance payment is made.

However, the right of an employee to claim compensation for disablement caused by compressed air illness, silicosis or other dust disease, or due to exposure or contact with arsenic, benzol, beryllium, zirconium, cadmium, chrome, lead or flourine or radiation diseases, shall not be barred by the failure to file within two years if claim is filed within ninety days after disablement and after knowledge that the disease was due to the nature of the employment.

The disease must have been contracted in the employment or in a continuous employment similar to the one in which he was engaged at the time of disablement within 12 months previous to the date at disablement. This does not apply to the above disease or if the employee has remained with the same employer under whom the disease was contracted.

North Carolina

Section 97-22. For injury cases, claim must be filed within two years after the accident.

Section 97-58. In the case of occupational disease, the claim must be made within two years after disablement or death. In the case of radiation, claim must be filed within two years after the date upon which the employee first suffered incapacity from the exposure and either knew or should have known that the disease was caused by the employment. In the case of asbestosis, silicosis or lead poisoning, the disasblement or death must occur within ten years from last exposure unless death follows a continuous compensable disablement and results within seven years after last exposure in the case of lead poisoning, 350 weeks for asbestos or silicosis.

North Dakota

Section 65-05-01. All original claims for compensation shall be filed within one year after the injury or within two years after death. The date of injury for purposes of this section shall be the actual date of injury when it can be determined with certainty by the claimant and the bureau. Otherwise, it shall be the first date that a reasonable person knew or should have known that the injury was related to employment.

Ohio

Section 4123.84(A). In injury cases, claims must be filed within two years after injury or death.

Section 4123.85. In all cases of occupational disease, or death resulting from the disease, claim for compensation shall be forever barred unless claim is filed within two years after the disability due to the disease began, or within six months of the diagnosis of licensed physician, or within two years after death occurs. For disability or death occurring prior to January 1, 1976, compensation or medical expenses shall be payable for silicosis, coal miners' pneumoconiosis, and other dust diseases (other than asbestosis) only if the disability or death resulted within eight years after the last injurious exposure.

Oklahoma

Section 43. The right to claim compensation under the act is forever barred unless within one year after the injury or death, a claim for compensation shall be filed with the commission. Claims may also be filed any time within one year from the date of last payment, any compensation or remuneration paid in lieu of compensation cr last authorized medical treatment.

In disease cases, a claim may be filed within eighteen months after the last exposure or eighteen months after the disease first becomes manifest by a symptom or condition from which one learned in medicine could with reasonable accuracy diagnose the specific disease, whichever occurs later.

Oregon

Section 656.265. Notice to be given to employer within thirty days after accident. However, failure to give notice within thirty days is excused if the employer had knowledge of the injury or death, for lack of prejudice, if payments have begun, or if notice is given within one year after the date of accident and the employee or his beneficiaries establishes good cause for failure to give notice within thirty days.

Section 656.807. In occupational disease cases, the claim must be filed within forty years after the last exposure and within 180 days after disablement or when a physician informs claimant of disease, whichever is later. In death cases, a claim must be filed within 180 days after date of death. For radiation diseases, the five yaer period is extended to ten years. Claims for asbestos-related diseases must be filed by the later of forty years after employment and 180 days from knowledge of the disease.

Pennsylvania

Sections 301(c)(2) 311 and 315 of Workers Compensation Code. Notice to employer must be given within 120 days after the occurrence of the injury. However, in cases of injury resulting from ionizing radiation or any other cause in which the nature of the injury or its relationship to the employment is not known to the employee, the time for giving notice shall not begin to run until the employee knows, or by the exercise of reasonable diligence should know, of the existence of the injury and its possible relationship to employment. The term "injury" means, in cases of occupational disease, disability resulting from occupational disease. Disability or death must occur within 300 weeks after the last date of employment in an occupation or industry where the employee was exposed to the hazards of the disease. Claims must be filed within three years after injury, death, or payment of last compensation. However, in case of injury resulting from radiation in which the nature of the injury or its relationship to the employment is not known to the employee, the time for filing a claim shall not begin to run until the employee knows, or by the exercise of reasonable diligence should know, of the existence of the injury and its possible relationship to employment. Again, the term injury means, in cases of occupational disease, disability resulting therefrom.

Section 301(c) 311 and 315 of the Occupational Disease Act. Notice to employer must be given within 120 days after compensable disability begins. A claim must be filed within sixteen months after
compensable disability begins, death, or last payment. Disability or death from occupational disease is compensable only if it occurs if within four years after the last date of employment in such occupation or industry.

Rhode Island

Section 28-35-57. An employee's claim for compensation shall be barred unless payment is begun or a petition is filed within three years after occurrence or manifestation of the injury or incapacity, or in the case of death, or in the event of physical or mental incapacity, within three years after the death or removal of the incapacity.

The time for filing claims shall not begin to run in cases of latent or undiscovered physical or mental impairment due to injury, including disease, until the person claiming benefits knew, or by exercise of reasonable diligence should have known, of the existence of such impairment and its causal relationship to employment or after disablement, whichever is later, provided, that in any case in which indemnity benefits have been paid, the right to compensation is preserved without time limitation.

Section 28-34-4. Occupational disease has a special statute of limitations which provides that the time for bringing suit shall be 36 months from the date of disablement and the date of contraction of the disease shall not be a limiting factor.

South Carolina

Section 42-15-40. (72-303) The right to compensation under this title shall be forever barred unless a claim is filed with the Commission within two years after the accident and, if death resulted from the accident, within one year thereafter; but the period shall not begin to run for occupational disease cases until diagnosis and communication of the diagnosis to the employee.

Section 42-11-70. The disease must be contracted within one year after the last exposure, except in the case of pulmonary disease arising out of the inhalation of organic or inorganic dust the period shall be two years. Special provisions for radiation diseases.

Section 42-13-60. In cases involving radiation injury or disability, the time for filing claims does not begin to run until the employee sustains the injury or disability and knows, or by the exercise of reasonable diligence should know of the existence of the injury or disability, its possible relationship to the employment. For radiation death claims, the statute of limitations does not begin to run until the person entitled to file claim knows, or by the exercise of reasonable diligence should know, the possible relationship of the death to the employment.

South Dakota

Section 62-7-35. The right to compensation under the title shall be forever barred unless a written request for hearing pursuant to Section 62-7-12 is filed by the claimant with the department within two years after the self-insurer or the insurer notifies the claimant and the department in writing that it intends to deny coverage in whole or in part under the title. If the denial is only in part, the bar shall only apply to such part.

Section 62-8-11. In occupational disease cases, an employer shall not be liable for compensation or other benefits under the provisions of this chapter for disability or death resulting from an occupational disease unless a claim is settled with the Department of Labor within two years after the claimant becomes disabled from the disease, or in the case of death of such disease, within two years of the date of such death.

Section 62-8-29. Written notice must be given to the employer within six months after the employment has ceased in which the disease was contracted. In case of death, notice must be given ninety days after the death.

Tennessee

Section 50-1003. The right to compensation shall be forever barred, unless within one year after an accident resulting in injury or death the notice required is given to the employer and the claim for compensation is filed with the tribunal having jurisdiction to hear and determine the matter, unless voluntary payments of compensation have been paid, in which case, the claim may be instituted within one year from the time the payments ceased.

Section 50-1008. The right to compensation for occupational disease shall be forever barred unless suit therefore is commenced within one year after the beginning of incapacity for work resulting from an occupational disease, and if death results from an occupational disease, unless a suit therefore be commenced thereafter. A claim for benefits for total disability or death due to coal workers pneumoconiosis shall be timely filed if such claim is filed within three years of the discovery of total disability or the date of death as the case may be.

Texas

Part II, Article 8307 Section 4(a). Unless the association or subscriber have notice of the injury, or a notice of the injury is given within thirty days after the happening of the injury or the first distinct manifestation of an occupational disease, no proceeding for compensation can be maintained. A claim for compensation must be made within one year after the occurrence of the injury or the first distinct manifestation of an occupational disease or, in case of death of the employee or in the case of his physical or mental incapacity, within one year after death or the removal of such mental or physical incapacity. For good cause the board may, in meritorious cases, waive strict compliance with the notice and filing of limitations.

Utah

Section 35-1-68. In case of injury causing death, a claim must be filed within one year from the date of death.

Section 35-1-99. In injury cases, notice of the accident or injury must be given to the employer within one year from tthe date of the accident. A claim must be filed within three years. The time is tolled if the employer/carrier does not notify the employer and Industrial Commission of its denial of liability or future liability.

Section 35-2-48. A claim for compensation or death from silicosis or any other occupational disease must be filed within one year after the date that the employee first suffered incapacity from an occupational disease and knew, or in the exercise of reasonable diligence should have known, that the occupational disease was caused by his employment.

Section 35-2-13. For occupational diseases other than silicosis and radiation diseases, total disability must result within one year from the last day upon which the employee worked for the employer against whom compensation was claimed. For radiation diseases, regardless of the provisions of 35-2-48, a claim must be filed within one year after the date upon which the employee first suffered incapacity and either knew or in the exercise of reasonable diligence should have known that the occupational disease was caused by present or prior employment. In the case of silicosis, total disability must result within three years in the case of silicosis not complicated by active tuberculosis, from the last day upon which the employee actually worked for the employer. The same provisions apply to death from silicosis, unless the death follows a period of total disability in which compensation has been paid or awarded.

For diseases other than silicosis and radiation diseases, death must occur within three years from the last day upon which the employee actually worked for the employer unless it follows a period of continuous disability.

Vermont

Section 21-656. For disability due to injury, a claim for compensation must be made within six months of the date of injury; or, in the case of death, six months after the death, if payments of compensation have been made voluntarily, the making of a claim within such period shall not be required.

Section 660. Want of or delay in making claim will not be a bar to proceedings if it is shown that the employer, his agent, or representative had knowledge of the accident or that the employer had not been prejudiced by such delay or want of notice.

Section 1013. With the regard to occupational diseases, a claim for disability or death must be filed within one year after the date of injury, date of death, or last compensation payment.

Section 1004. For occupational diseases, the date of disablement shall be the date upon which any physician consulted by the employee and who is a licensed practitioner of medicine shall state in writing, upon a form prepared and provided for by the Commissioner, that the employee has an occupational disease listed in this title and disabled thereby. The date of disablement shall be the date of injury and shall be the equivalent of the date of accident for injuries.

Section 1006. Disablement must occur within five years after the last injurious exposure to such disease in employment and death must occur during such period or follow continuous disability from the disease, commencing within the period above limited from which compensation is payable and must result within twelve years after last exposure. The limitation does not apply to radiation disease and a claim for radiation disease must be filed within one year after the date the employee first suffered incapacity from the exposure and either knew or in the exercise of reasonable diligence should have known that the occupational disease was caused by his present or prior employment.

Virginia

Section 65.187. For injury, claim must be filed within two years of the accident and, if death results, within one year after death.

Section 65.1-52. For occupational diseases, a claim must be filed with the Industrial Commission within three years for coal workers pneumoconiosis, and within two years for all other occupational diseases, after a diagnosis of an occupational disease is first communicated to the employee or within five years from the date of the last injurious exposure, whichever first occurs; and, if death results from the occupational disease within either of said periods, the claim therefore be filed with the commission within three years after the death. For byssinosis the claim must be filed within 7 years after exposure. The limitation between disablement and injurious expbsure does not apply to asbestosis, cataracts, certain skin cancers, radiation illnesses, ulceration due to chrome compounds or to caustic chemical acids or alkalies and undulant fever caused by the industrial slaughtering and processing of livestock and handling hides, mesothelioma, and angiosarcoma of the liver due to vinyl chloride exposure.

Washington

Section 51-28-050. For injuries, the claim must be filed within one year after the date upon which the injury occurred or the rights of the dependents or beneficiaries accrued.

Section 51.28.055. Claims for occupational disease or infection must be filed within one year following the date the workman had notice from a physician of the existence of his occupational disease without reference to its date of origin.

West Virginia

Section 23-4-15. For injuries, the application must be filed within two years after the injury or death.

For occupational diseases, the claim must be filed three years from last exposure or three years after the employee's occupational disease was made known to him by a physician or from when he should have reasonably have known of the disease whichever occurs last, or two years after death.

Wisconsin

Section 102.12. For both occupational diseases and injuries, if no payment of compensation other than medical or burial expense and no application is filed with the department within two years of the date of injury or death, or from the date the employee or his dependents knew or ought to have known the nature of the disability and its relation to its employment, the right to compensation shall be barred, except that the right to compensation shall not be barred if the employer knew or should have known within a two year period, that the employee had sustained the injury on which the claim is based.

Section 102.17(4) The right of an employee, the employee's legal representative or dependent to proceed shall not extend beyond ten years from the date of injury or death or from the date compensation, other than treatment or burial expenses, was last paid, or would have been payable if no advancement was made, whichever is the latest. This does not apply to occupational diseases, for which there is no statute of limitations, except that the benefits becoming due after the twelve year period or paid from a working injury supplemental fund.

Wyoming

Section 27-349. For injuries which are the result of a single brief occurrence a claim must be filed within one yaer after the date of the injury or for injuries not readily apparent, within one year after discovery by the injury by the employee. In cases of injuries which occur over a substantial period of time (i.e., occupational disease) a claim must be filed within one year after the diagnosis of injury is first communicated to the employee or within three years from the date of last injurious exposure to the conditions causing the injury, whichever comes last. The three year limitations does not apply to radiation diseases.

(3/84)

Occupational Disease Case Law on Statutes of Limitations

Alabama - Mason v. Jones, 278 Ala. 532, 179 So2d. 281 (1965). Claim filed within one year after date of the last exposure to the hazards of the disease. (occupational pneumoconiosis)

Alaska - no cases.

Arizona - Mead v. American Smelting and Refining Company, 1 Ariz. 72, 399 P2d. 694 (1965). Starts to run when the injury becomes manifest or when claimant knows or should have known he sustained compensable injury, claim filed within one year of this. (See also, Nelson v. IC 585 P2d 887 (1978)).

Arkansas - Jeffrey Stone Company v. H. Raulston, 412 SW2d, 275 (1967). For silicosis starts to run at time of disablement and not from time claimant learns he is suffering from disease and disablement does not occur until claimant is unable to work and earn wages. Injury may occur before disease manifest.

California - Fruehauf Corp. v. Workmens Comp., Appeals, Bd. 68 Cal. Rptr. 164, 68 Cal. 2d. 569. 440 P2d. 236 (1968). Date of injury for occupational disease is date on which employer first suffered disability and knew or should have known that disability was caused by employment. Limitations provisions in W.C. law must be liberally construed in favor of employer unless otherwise compelled by language of statute, and such enactments should not be interpreted in a manner which will result in a right being lost before it occurs.

Colorado - City of Boulder v. Payne, 426 P. 2d 194. "Injury" means compensable injury. Claims filed 5 months after date claimant learned of injury not barred - although 5 years plus after injury.

Connecticut - Backiel v. Mohican Co., 11 Conn. Sup. 225 (1942). Starts to run within first manifestation of the disease--claim filed within one year of this.

Delaware - no cases.

Florida - no cases.

Georgia - Vaughn v. Coal Operators Casualty Co., 106 Ga. App. 129, 126 SE2d. 428 (1962). One year from disablement to file claim and disablement must occur within three years of last exposure.

Hawaii - no cases.

Idaho - Frisbie v. Sunshine Mining Comp., 93 Idaho 169, 457 P2d. 408 (1969). Must file within one year after disability occurs--whenever this happens--in this case he became disabled twelve years later.

Illinois - no cases.

Indiana - Hibler v. Glove American Corp., 147 NE2d. 19 (1958). Two years from date of disablement in which to institute and maintain an action or claim for compensation.

Iowa - Jacques v. Farmers Lumber and Supply Co., 242 Iowa 548, 47 NW2d. 236 (1951). Filed after manifestation of disease.

Kansas - Ross v. Beech Aircraft Corp., 214 Kan. 888, 522 P2d. 369 (1974). Claim filed within one year of diagnosis.

Kentucky - Blue Diamond Coal Co. v. Terry, 416 SW2d. 350 (1967). Dates period from first manifestation of the disease--when he knew or should have known.

Louisiana - La Custa v. J. Ray McDermott and Co., 193 So2d. 779 (1967). Claim filed within four months of knowledge and limitation period runs only from time he becomes disabled.

Maine - no cases.

Maryland - Gracie v. Kappers Company, 213 Md. 109, 130 A2d. 754 (1957). One year period of limitations begins to run when any disability, except a trivial matter, arising from an accident and eventually reopening into the class of disability for which compensation is claimed became or should have become reasonably apparent to workmen. Limitations start to run from time employee knew or had reason to believe that he was suffering from occupational diseases and that there was a casual connection between his disability and occupation.

Massachusetts - Bergeion's Case, 137 NE739, 243 Mass. 366 (1923). The date of the last injury was the date when the accumulated effects of the lead poisoning first incapacitated deceased for work and not the time when he was first treated for lead poisoning.

Michigan - Norris v. Chrysler Corp., 391 Mich. 469, 216 NW2d. 783 (1974) and Lewis v. Chrysler Corp., 394 Mich. 360, 230 NW 2d. 538 (1975). Time period runs when the employee has knowledge or reasonable grounds for knowledge of disability and when he discovers or by reasonable diligence could discover that this disability may be work related.

Minnesota - Garber v. Peter Lametti Construction Company, 197 NW2d. 443 (1972). Three year statute of limitation--three years from last exposure to silica dust. Exposure can't be more than three years before disablement.

Mississippi - no cases.

Missouri - Myers v. Rival Manufacturing Company, 442 SW 2d. 138 (1969). Begins to run when it becomes reasonably apparent that compensable injury has been sustained--not barred by one year statute of limitations because he was not aware before this.

Montana - no cases.

Nebraska - *Plambeck v. Natkin and Comp.*, 171 Neb. 774, 107 NW2d. 734 (1961). Notice and claim within one year after employee has knowledge that accident caused compensable injury.

Nevada - no cases.

New Hampshire - *Boucher v. John Swenson Gianiti Company*, 178 A2d. 685 (1962). First date of treatment by a physician shall be taken as the date of injury and the statute of limitations is one year from the injury.

New Jersey - *Vahta v. Bogue Electric Mfg. Co.*, 158 A2d. 536 (1960). Filed within two years after the cessation of the injurious exposure.

New Mexico - *Salazar v. Kaiser Steel Co.*, 85 NM254, 511 P2d. 580 (1973). Period for filing claim began when union told them they were disabled and not the earlier date when doctor told them to leave mine.

New York - *Zambrona v. Renell Brake Shop, Inc.*, 34 App. Div. 2d. 707, 309 N.Y.S. 2d. 758 (1970). May fix as disablement date the date on which physical impairment in nature of an occupational disease was diagnosed; if no diagnosis of occupational disease is initially made, and claimant suffers loss due to absence from employment, only the Board may properly set the date of the later diagnosis as the date of disability.

North Carolina - *Huskins v. United States Steel Corp.*, 241 NC 128, 84 SE 2d. 645 (1954). Begins to run when informed by competent medical authority that he has occupational disease and that disablement occurred within two years from last exposure. (Prior statute).

North Dakota - *Beauchamp v. North Dakota Workmens Compensation Bureau*, 126 NW 2d. 417 (1964). Must be filed within one year of manifestation of disease.

Ohio - *Maxwell v. Industrial Commission of Ohio*, 810 Ohio L. Abs. 61, 160 NE 2d. 346 (1959). Silicosis claim filed within one year after total disability began or within such longer period as does not exceed six months after diagnosis of silicosis by physician.

Oklahoma - *National Zinc Company v. Heinline*, 360 P2d. 236 (1961). One year limitation begins to run from last hazardous exposure. (Prior statute).

Oregon - *Hutchison v. Semler*, 361 P2d. 803 (1961). Statute of limitations begins to run when employee became apprised or as a reasonable man should have known that his health was being undermined by dust he was breathing.

Pennsylvania - *Scobbo v. Workmens Compensation Appeal Board*, 348 A2d. 169 (1975). Statute liberally interpreted--limitation begins to run when employee is disabled and knows definitely that he is disabled by O.D.

Rhode Island - Britto v. Farm Corporation, 176 A2d. 81 (1961). Timely filed within two years after discovery of casual relationship between employment and disablement, although disablement was filed previously.

South Carolina - Drake v. Raybestos - Manhattan Inc., 241 SC116, 127 SE2d. 288 (1962). Begins to run when the disease has culminated in disability and when claimant should have discovered disease was compensable--whenever this is.

South Dakota - no cases.

Tennessee - Christopher v. Consolidation Coal Co., 440 SW2d. 281 (1969). One year after the employee knows or should have known that he had an O.D. in this case it was four years after he left job.

Texas - Brantley v. Phoenix Ins. Co., 536 SW2d. 72 (1976). Repealed three year limit. Date of cumulative injury from O.D. shall be date disability was caused. In this case the plaintiff argued that because statute repealed his claim was not barred. Court held that O.D. occurred before the repeal of three year statute of limitations and so was barred.

Utah - Vause v. Industrial Commission, 17 Utah 2d. 217, 407 P2d. 1006 (1965). Begins to run when condition at point of total permanent disablement--then filed within one year of this. Statute liberally construed.

Vermont - no cases.

Virginia - Blue Diamond Coak Co. v. Pannell, 203 Va. 49, 122 SE 2d. 666 (1961). Within one year after first manifestation of disease--no matter when it shows up.

Washington - Nygoard v. Dept of Labor & Industries, 51 Wash. 2d. 654, 321 P2d. 257 (1958). Begins to run when compensable disability results--when given notice by doctor that disease is occupational.

West Virginia - Turner v. State Compensation Commission, 147 W. Va. 145, 126 SE 2d. 379 (1962). Filed within two years of last exposure to silicon dust.

Wisconsin - Pendzich v. Industrial Commission, 105 NW 2d. 781, 11 Wis. 2d. 531 (1960). Six years after last day of work for employer whose employment caused the disease. (Prior statute).

Wyoming - no cases.

Mr. **Murphy**. Mr. Coakley.

Mr. **Coakley**. Mr. Chairman and members of the subcommittee: My name is Charles Coakley. I am Senior Counsel with the American Insurance Association, which is a trade association composed of about 165 property casualty insurance companies. Our members write approximately 50 percent of the workers compensation policies in this country.

We have looked over H.R. 3090 which, quite simply, is a Federal occupational disease law for all occupational diseases. Unlike Congressman Miller's bill, this bill starts out with asbestos, how the Secretary of Health is mandated to designate other substances with the same types of presumptions that are in the bill for asbestos.

So at the outset, we have to ask why do you want to enact a Federal occupational disease law which would have the potential of supplanting the individual State OD laws? When as we have heard this morning and we have heard in previous sessions on other bills of this subcommittee, that the problem is a tort problem in asbestos. There is no workers compensation problem in asbestos. There's a small number of cases that have been filed over the years in the workers compensation system for asbestos. They continue to be filed and State systems take care of them. There are in Mr. O'Day's prepared statement many references to studies, the Department of Labor had a study that showed that about 85 percent of those claimants who filed for occupational disease benefits due to asbestos received them—admittedly, after some litigation, but they got paid. The ones who didn't file, didn't file for a number of reasons that you heard here this morning, possibly the pot of gold at the end of the rainbow, perhaps being number one.

So if the workers compensation system is working, as we believe that it is, and I think that we can demonstrate that it is on the State level, what is going to be accomplished by a Federal occupational disease law, which does not address the tort problem. This bill does address in fashion, limited fashion, in only a section, the tort problem, and that is the provision taken from Senate 100, Senator Kasten's bill, which provides that there is no subrogation by the employer against the third party judgment. The amount of workers compensation paid is subtracted from the judgment against the asbestos defendant and there is no action for contribution, or indemnity, against the employer by the asbestos defendant. We endorse that provision of Senator Kasten's S. 100 bill. That's one of the few good things that's in this bill. But the other parts of the bill that are objectionable don't outweight this what I call a three-cornered proposal.

Now, this Federal OD law would, I think in time, supplant State statutes because the bill provides that all State awards for workers compensation would be deducted from the Federal benefit here. So you begin to ask yourself: What do we need a State system for? We are just deducting the award. Why not just have the Federal system and that will pay the award? The State system is then an appendage, it really becomes unnecessary. And when we add in all of the other toxic substances that are mandated to be included in this bill, we can see that in a fairly short time the State systems would cease to exist. Or, probably even worse, the presumptions that are in this bill would be transferred into State laws.

This bill would be immensely expensive. You heard the Manville Corp.'s estimate of the costs. I don't know if they are too low, too high, or what. We have not had a chance to cost this bill out—it would probably take some time to figure it. But just looking through it, you can see that right from the beginning you are going to revive time barred claims. Anyone who is ever exposed to asbestos, who was ever disabled, and who is dead, and whose dependents are still around, have 2 years—or 3 years, I forget which—to file a claim after enactment of this law.

I believe that you would have a tremendous influx of claims on day one—you would have spouses, you would have widows, widowers, coming in with claims where this worker died back in, you name it, 1942, 1952, allegedly of asbestosis, of mesothelioma. All of these time barred claims would be revived under this law.

I submit that that's very, very costly, because the further back in time you go, the much more difficult it would be to defend against these claims, particularly with the presumptions that are in this law. Obviously, you can't x ray a corpse. So that a conclusive presumption would be used for someone who could show that a worker was exposed to asbestos for the required number of years—1 year up to 20—listed in the presumptions. And, really, you could not rebut that. There would be no way to show that the person died of something else. Maybe he or she smoked three packs of cigarettes a day, and as a diagnosis 20 years old that someone died of lung cancer. Due to what?

In addition, there's a very high minimum benefit. The minimum benefit in here is 80 percent of the national manufacturing wage. I haven't had time to find out what that is. But let's assume that it's somewhere around $250. It may well be higher. What's being proposed here is a minimum benefit of $200 a week, somewhere in that neighborhood. That's very high, particularly when you consider that it is $200 a week tax-free.

Now, if you have someone who is making even $300 a week, or perhaps more, they may not take home $200 a week after all the taxes, Social Security, and whatnot is deducted from the paycheck. It seems to me this is a severe deterrent to rehabilitation, because you are going to have people who do not know what they earn while they are working, getting around 200 tax-free dollars per week.

Now, someone who is temporarily disabled and is collecting this, and who knows that if he goes back to work he is going to be making less than this tax-free benefit. I submit to you, he is not going to go back to work in any great hurry.

I would say that this minimum benefit of around $200 a week is higher than some States, although many States do have higher maximum benefits than $200 a week. But I know of no State that has a minimum benefit of $200 a week or anything close to that.

Then there are the presumptions—which probably are the worst part of this bill, presumptions simply create a legal disease. And workers compensation laws are designed to provide benefits for injuries and diseases arising out of and in the course of employment, simply meaning that there has to be a casually related occupational cause to disease.

Here we have severe presumptions, much more severe than the black lung. I hate to keep banging away at the black lung law—everyone has taken a whack at it this morning—but we all know what a disaster that has turned out to be. This is worse. The presumptions here are much more inclusive than black lung.

Quite plainly, any one cancer would be compensable under this law, the way I read it. Because even with an x ray that showed clear, if the worker worked from 1 year up to 20 years, there's a conclusive presumption that worker is eligible. Even if the x rays don't show anything.

But even if they didn't work the required number of years for the presumption to take effect, instead of a conclusive presumption you would have just a plain old presumption. I think that plain old presumption is enough to get just about every lung cancer paid for. There are other cancers—and if you use the same presumptions for the other diseases that would be designated down the road, I would say to you that what you would have here is a pension system that almost approaches an accident/health plan, Blue Cross plan, paying guaranteed very high benefits for what need not be related to employment, or arising out of the employment.

I don't know if Manville's figures, dollar figures, on the low cost/high cost included the cost that would be generated by these presumptions alone.

Then I find some due process problems in this bill. For example, hearings can be held, but only at the claimants' request. The Office of Workers' Compensation is going to administer this law. And then if the OWCP finds the case to be compensable, then the employer or the fund has no recourse at that point. Hearings are only at the option of the claimant. If the claimant doesn't like what he or she is getting, or gets turned down, then the claimant can request a hearing, the referral to the Board of Impartial Physicians to determine whether the person is disabled or what they have is only at the option of the OWCP, or the claimant himself. The employer or the fund could not ask for a referral to the impartial doctor. And then only the claimant can challenge the finding of the impartial doctors. So if the impartial panel says you don't have asbestosis, or you are not disabled, the claimant can challenge that finding. But if the impartial panel says that there is causal relationship and the claimant does have asbestosis, no challenge by the employer or the fund.

As I say, that offends my notion of due process quite a lot. I think there's a severe constitutional problem with that issue. I am not a constitutional law scholar but I think that could very well prove fatal to the bill.

Finally is the fund, the monopoly fund that's going to pay all of these benefits and is going to assess in some fashion—and I don't know how it would be done—on some formula, varying with whatever preventive measures are put into effect by some employers, although since many of these people who would be paying companies, employers would be paying are no longer in the asbestos business, no longer using it—I don't know how those particular formulas would apply. You can't have cost containment against something—prevention against something that is no longer there.

But the fund can't work the way it's structured. It is just simply actuarily unsound. The fund is an insurance company, pure and simple, or should be, if it is going to pay benefits to workers, it is in effect an insurance company. It's a Federal insurance company, but an insurance company nonetheless. And insurance companies cannot operate like this fund is designed to operate. And in fact, if any insurance company were to try to do so, the State regulator would stop them immediately because that company would be insolvent in a fairly short time.

There is no provision here for reserves. There's no provision here for investment. All this is, is a pay-as-you-go system. Now we have seen what happened to Social Security with pay-as-you-go. Every so often the Congress has to get up very large chunks of money to infuse the Social Security system so that it continues on. And that's what the problem of Social Security is. There's actually an even more of a parallel because as time will go on, there will be more and more claims coming in and possibly fewer businesses around to assess for the payment for the contributions that would be needed to pay for these claims.

You can not operate an insurance company—which is what the fund is—by figuring out at the beginning of each year how much am I going to pay in claims and assessing only that amount from the existing pool of employees, and then the next year do the same thing over and over again. If you talk to any actuary, he or she will tell you that that's the way it has to be, that it can't work that way.

What will happen is that these claims will come in—very many of them in the beginning, because of the retroactive feature, and as other substances are designated, down the road you will get more and more claims. Now, remember, these claims are all ongoing. It isn't as though you pay the first 20 claimants for the first year, and then you don't pay them anymore, and then the next year you get 20 more claimants to pay. The first 20 are still with you, the next year, the year after that, and the year after that. And they keep being joined by more and more claimants. So what happens is it's like a snowball rolling down the hill. After 2 to 3 to 5 years, depending upon the volume—and I think you would be well advised to consult an actuary on this particular facet of the system, who could do a lot better than I can to really put it into graphs, money, to see where the insolvencies would occur.

But it gets to the point where, like the snowball, the assessments are so great because of the continuing influx of claims, and the claimants who are still there who keep getting paid, and even when they die, their dependents are going to continue to collect—that the assessments would approach the point of bankrupting most of the companies that have to pay it. Remember, as I said, "This is an insurance company and it can't run the way that it is run here."

Those are the main problems that we have with the bill as far as the technical nature is concerned——

Mr. MURPHY. Otherwise, the bill's all right.

Mr. COAKLEY. Well, I told you there are a couple of good features in there. But I just want you to know that it can't work the way that the bill has been structured.

And getting back to my first point, why do you need a Federal OD law when the problem is a tort problem?

Mr. MURPHY. Let me open the discussion with that question with a question to you. How do we overcome the statute of limitation problems on workers comp claims? Now, this is something that has been perplexing many claimants for years, and particularly the lung cancer, asbestos victims, and others. They then are left with either no claim or a product liability claim.

Mr. COAKLEY. Most States today, and the States are decreasing in number that have them—restrictive statutes—most States today have an open-ended statute of limitations. Mr. Williams' State, Montana, this year enacted an open-ended statute of limitations. I think it is the most recent State that has done so. But in the past years, Maine, Indiana, South Dakota, I believe, and lately Montana, and it's under consideration in other States. Most States—the vast majority, approaching 40—do not have any restrictive on filing occupational disease claims. So that in most States if you lost work or exposed to asbestos or anything else, for that matter, 5, 10, 15 years ago, and become disabled today, you are able to collect benefits.

The usual standard is in most States that the statute of limitations does not begin to run until disability occurs and the claimant knows, or by the exercise of due diligence, should have known of the disease and its relationship to employment. That's boilerplate you find all over. We support that. We tried to enact it. I have written several bills to do that and I had a hand in drafting and getting Montana's bill put through.

Right across the river in Virginia, we have had a horrendous court case just recently which severely restricts payment of occupational disease. We are looking to overturn that court case by legislation. As Mr. O'Day indicated, we would actively seek labor's help in doing this.

So, the system is not perfect, as you have heard before this morning. Most States do have open-ended statutes. Those that have close-ended ones, we are trying to fix. But even there, in those States, usually, not always, but usually, the worker works in the environment for a number of years and then gets sick and files a claim. So that even though some States say that you have to file the claim within 2 years of last exposure, in many cases the person becomes sick within 2 years of last exposure. But that's no reason to say that they should not be changed.

We would like to change them all. We are endeavoring to do that. That's different from what this bill does here, is that it revives already time barred claims, going way, way back many, many years. I think that's very, very expensive. Also, it's an encouragement to someone to come in and file a claim which under this bill would very likely, almost certainly, have to be paid with hardly any evidence of what this person died from.

Mr. MURPHY. How do you feel about the Wellington fund proposal? I understand the insurance companies are participating in that?

Mr. COAKLEY. Yes; many of my members are participating in that. It seems to me that, that or other things like it are necessary. Because if we continue to try all these asbestos cases—and God help us if anything else comes along like asbestos in the future—there will not be enough money from self-insured employers or from insurance companies to pay these judgements on a tort-case-by-tort-case basis. It is just too expensive and it's also too chancey.

There are people who lose their tort cases. I think you have heard, Mr. Chairman, in other hearings before other bills, representatives of other asbestos companies, come in and tell you they win most of their tort cases. But the cost of defense is bankrupting them. Manville, if they won all their cases, they still would be in chapter 11 because of the expense of defending them.

So there has to be a better way of doing this—whether it is compulsory arbitration, whether it's other things like Wellington, those kind of solutions must be found. But those are solutions to a tort problem, not the State workers comp problem, in which there is no problem.

Mr. **Murphy**. Thank you.

Mr. Williams.

Mr. **Williams**. Thank you, Mr. Chairman.

To allay what could be a misapprehension about the baseline data which I use, I want to have the record show that the statement in my opening remarks that at least 23,000 Americans will die this year from work-related cancers, comes not from the 1978 report of the Office of Safety and Health Administration, but comes, rather, from the American Cancer Society, which delivered that information to me 6 weeks ago.

It is interesting that the opponents of my legislation, when they speak about the number of work-related deaths use the lower figure. When they talk about the costs of this bill, they compute them on the more dramatic higher figure.

Mr. O'**Day**. There's a reason.

Mr. **Williams**. I want to express my surprise at the insurance industry in trying to make a case for the fact that this may not be a proper area for the Federal Government to point to Social Security. I know it is politically fashionable to trash Social Security and call it a big error in our system and say it hasn't worked, but while it may be fashionable, it's also wrong. Had we relied on the private insurance companies to provide Americans with the benefits which they have received under Social Security, we would still be waiting.

Yes; the costs of Social Security have gone up—so have insurance premiums, since 1936.

Yes; the benefits of Social Security have changed. So have private insurance benefits, since 1936.

But one thing has not changed and that is you cannot purchase the benefits of Social Security from a private insurance company at anywhere near the cost. So, Social Security has been a success in our society—so have private insurance companies. They both have their place.

Thank you, Mr. Chairman.

Mr. **Murphy**. Thank you, Mr. Williams.

Mr. Petri.

Mr. **Petri**. No questions.

Mr. **Murphy**. Mr. Bartlett.

Mr. **Bartlett**. Thank you, Mr. Chairman, and only one question. The hearing has been long but the witnesses have provided excellent testimony.

You have sold me on H.R. 3090, at least your opposition to it. You said in your testimony on page 10, for example, that 89 percent of the claimants under the comp system were actually paid.

Do you have any sense as to what percentage of the claimants for asbestosis that represents?

Mr. **O'Day**. Very small.

Mr. **Coakley**. Very small.

Mr. **Bartlett**. So 89 percent of 1 percent is still less than 1 percent?

Mr. **O'Day**. Right.

Mr. **Bartlett**. So your point is that the fault is with the tort system, not with the comp system. I agree.

Mr. **O'Day**. Exactly.

Mr. **Bartlett**. So what do you suggest? Is H.R. 1626 the right way to solve the tort system?

Mr. **O'Day**. No, not at all.

Mr. **Bartlett**. What is? What would you suggest?

Mr. **O'Day**. There are a variety of things, and depending on your——

Mr. **Bartlett**. Put them in priority.

Mr. **O'Day**. The Wellington group. The Wellington action is something that's taking place right now, and that's working—it's starting to work. I think you have heard from the people. That's a voluntary activity.

Mr. **Bartlett**. Describe for us how that addresses——

Mr. **O'Day**. Basically they bring themselves together—the insurers and their carriers. They share their costs so that they are not multiplying lawyer upon lawyer upon lawyer, and so on—and in an expedited fashion will handle claims that come to them without barring these people in any sense—if they are not happy with the offer that is made to them to handle their claim—from going to court.

So there's a tremendous incentive for them to please these people. They also have a way of determining some future claims—since they don't want to bar people from some future activity where they say they can't compensate them today—so they give them, I think they call it a green card or something like that. But basically it would say, you can come back when you are sick, when you are disabled, and we will make you an offer and pay you. So, again, it's a working system.

I am not that familiar with all the ways it works except that it's private business trying to handle an extremely expensive and time-consuming, and all those other words that you have heard, tort problem—not workers compensation.

Nothing prevents these people from also getting workers compensation if they are eligible for it. As we have talked about, some of them just don't want to pursue workers compensation. It's not a big enough award. It is not a $100,000 award. It is not a possible $500,000 award. You know, you talk about average amounts, and those are real things, the average amounts, that the people are paying these. But it varies from those who get very little to some who get very, very high.

There's a jackpot, a casino society out there. It's much more than asbestos. It's what we are talking about, Mr. Bartlett, in product liability. It's involved in our whole civil justice system. And it is not one bill, or one Congress, or one body that's going to address it. It is something that we have all got to be working on at many, many different levels.

H.R. 1626 sets up some dangerous things as far as we are concerned in workers compensation. Maybe it could take care of the asbestos problem but in its process overwhelm or ruin the State workers compensation system. We don't think that is a very fair trade-off.

We are sympathetic to the problems, very sympathetic. Our companies are involved in them. The Wellington is a voluntary way. There is the Danforth bill that you have heard mentioned, which also sets up sort of an expedited system. There are a variety of solutions.

But if we think that there is some sort of a panacea here—H.R. 3090, or H.R. 1626, or S. 100, or what have you—we are just kidding ourselves. There is no simple solution to this. It is a complex problem and it has developed over many, many years. And if you try and apply simple solutions—legal fiat—to it, you are just going to wreck the system. As Mr. Coakley was saying, you will bankrupt the system.

Mr. BARTLETT. Mr. Chairman, I think in my judgment the system is either wrecked or is being wrecked at present, so perhaps one day we would have a hearing to examine those complex solutions and attempt to try to identify the complex solutions.

Thank you, Mr. Chairman.

Mr. MURPHY. Thank you. That will conclude this morning's hearing. Thank you very much to all the participants.

[Whereupon, at 12:10 p.m., the subcommittee adjourned.]

BLANK PAGE

472

HEARINGS ON COMPENSATION FOR OCCUPATIONAL DISEASES

THURSDAY, NOVEMBER 7, 1985

House of Representatives,
Subcommittee on Labor Standards of the
Committee on Education and Labor
Washington, DC.

The subcommittee met, pursuant to call, at 1:30 p.m., in room 2261, Rayburn House Office Building, Hon. Austin J. Murphy (chairman of the subcommittee) presiding.

Members present: Representatives Murphy, Williams, and Petri.

Staff present: Richard Fiesta, counsel; Tom Lamb, staff director; Mark Powden, minority administrator and labor staff director.

Mr. Murphy. Today, the Subcommittee on Labor Standards hears testimony on H.R. 3090, the Occupational Disease Compensation Act, introduced by my colleague from Montana, Pat Williams.

Today is the fifth hearing in this session on the issue of occupational disease compensation.

Today's panel of witnesses represent the interests of workers who are afflicted with occupational diseases and who for over the past decade have been deeply concerned with disease resulting from the workplace.

It is my earnest hope that as the subcommittee winds down the hearing process on occupational disease that a fair and reasonable solution to the problem of occupational disease payments can be made.

I hope that soon the subcommittee will reach a consensus about the very pressing problem of occupational disease.

And I welcome my colleague Mr. Pat Williams for his opening statement.

Mr. Williams. Thank you, Mr. Chairman.

The results of occupational disease add up to a massive public and personal subsidy of American industry. The tragedy of occupational disease is that its costs are borne by the victims and, to a lesser degree, by the public.

We do know that employers are not paying for the cost of occupational disease, except, of course, as they become unwilling defendants in tort cases.

We know that despite the public intention, the costs of production are not bearing the costs associated with occupational disease. And we also know that the public welfare system, Medicare, Medicaid, Social Security disability, is bearing much of the cost of the uncompensated occupational diseases.

Of course, we also know that the victims themselves, in addition to their pain and suffering, are paying for their own diseases through their life savings, their lost changes, and, tragically, with their lives.

According to one Department of Labor study, occupational diseases cost workers $11 billion in lost wages alone.

Now, what my bill attempts to do is to put those costs back where they belong. It's that simple. I'm trying to put them back in the production line, in the production process, in the workplace, to have them shared through the costs of production, because, after all, it was in the production of those products that the diseases were caused in the first instance.

And, so, while the bill has some complexities to it, the purpose of it is simple—to take the cost of occupational disease off of the victims and off the public and put it in a shared way through the cost of production.

Thank you, Mr. Chairman.

Mr. MURPHY. Thank you, Mr. Williams.

We are also joined by the ranking member of the subcommittee Mr. Tom Petri of Wisconsin.

Mr. Petri, I understand you do not have an opening statement at this time.

Thank you.

And while I'm here, Ray, I want to thank you very much. As you know, today the House approved the conference report on the Fair Labor Standards Act Amendments of 1985. And I appreciate the efforts of organized labor in bringing that to a very satisfactory conclusion, keeping a lot of Congressmen very satistifed with the results.

The first witness. I understand Bob Georgine is in Chicago and is unable to appear this afternoon.

We have his testimony and without objection we'll submit his entire testimony for the record.

[Prepared statement of Robert A. Georgine follows:]

PREPARED STATEMENT OF ROBERT A. GEORGINE, PRESIDENT, BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO

Mr. Chairman and Members of the Committee, I am very pleased to join with my colleagues from the AFL-CIO and the Industrial Union Department to testify on behalf of the Building and Construction Trades Department in support of H.R. 3090, the Occupational Disease Compensation Act of 1985.

Congressman Murphy, I recognize your persevering efforts to reach a consensus for legislation on compensating victims of asbestos exposure.

And, I also want to commend Congressman Williams for his foresight in introducing this important measure.

We understand that this is not an easy task as there are great complexities in dealing with issues of exposure to toxic substances and processes. We are, however, seeing efforts to cope with exposure in more than the workplace in such legislative proposals as the Superfund and product liability reform. There are a host of environmental concerns and there are strong views on all sides, but I believe that now is the time to move forward. Now is the time for Congress to deal with this urgent need.

The Building Trades Department has been involved in safety and health concerns for many years. We supported enactment of the Construction Safety Act, a precursor to OSHA. We have been deeply involved in the regulatory process under the Occupational Safety and Health Act since its inception and even today are engaged in the struggle under that Act to secure acceptable standards for asbestos exposure in the construction industry.

We support the concept of notification of workers who have been exposed to toxic substances and processes such as is contained in H.R. 1309, the High Risk Notification Act. Many of the same provisions are in H.R. 3090.

I appointed a special Committee on Occupational Disease which has been meeting since 1983 to review the issues and legislative proposals in this area. That committee developed a number of recommendations for occupational disease compensation that have been incorporated into H.R. 3090.

Earlier this year the Building and Construction Trades Department created a national Trust Fund for training, education and research in construction safety and health to deal with the need for cooperative employer and union activities in the occupational health and safety area.

Many of our affiliates have also initiated their own programs of education and training to deal with health and safety.

Now the time has come to take steps to assist the victims of occupational disease for whom the efforts at prevention will arrive too late.

Mr. Chairman, this is the fifth time the Building and Construction Trades Department has come before Congress to petition for acton on occupational disease. We presented testimony before this Committee in 1983 and again last April, when you began this series of hearings. And, we appeared before the Senate in 1984 and 1985. some Building Trades affiliates have also made their views known because this is an important issue in the construction field. I ask Mr. Chairman, that a copy of my statement at the hearing on April 23, 1985 be included in the record at this point. In that testimony we gave a detailed analysis of our concern with occupational disease and its impact on construction workers. That framework is important for the remainder of this discussion today.

As I said in previous testimony before you, we in the building Trades Department have been aware for many, many years of the traumatic injuries that can occur due to the dangerous nature of constriction work. In recent years, we have seen the emergence of diseases in construction workers caused from exposure to the very materials that they have carried, mixed, formed, cut, shaped or even removed and repaired. Our members have become extremely concerned with the impact of conditions of their workplace and their health as well as their safety.

Members of every one of our international unions have had exposure to asbestos and other toxic substnaces each day in their workplace. We know from the research done by Dr. Irving Selikoff at Mr. Sinai Hospital in New York City that nearly 7½ million construction workers are at some degree of risk in developing an asbestos-related disease. We know that within the next twenty years there will be several thousand annual excess deaths from asbestos-related lung cancer just among construction workers alone.

The needs and priorities required in legislation to handle occupational disease compensation are embodied in this vehicle, H.R. 3090, which we believe, when enacted, will give the necessary and appropriate compensation protection to those workers who are not now eligible for compensation or for whom the existing state laws have proven to be inadequate.

H.R 3090 provides broad coverage to workers, including dependents of workers, who are exposed to these substances and later develop diseases from such exposure.

The bill provides a decent level of benefits with a recognition that wages of construction workers require separate treatment, a provision for annual adjustment; and special treatment for those who have left the workforce when they become ill. The long latency between exposure and development of the disease makes this an essential requirement.

There is a reasoned claims procedure that involves the use of medical presumptions where appropriate as well as a hearing process that limits the adversarial approach.

The bill protects the individual's right to bring acton against manufacturers and those employers who intentionally subject their workers to exposure. However, there is an offset of compensation against any third party recovery.

Very important to those of us in the construction industry is the fact that H.R. 3090 goes beyond asbestos and recognizes that there are other toxic exposures and processes in the workplace. The bill provides a mechanism to include other diseases in the compensation scheme as they are found to be caused by exposure to toxic substances.

It is essential that such a provision be included in any legislative solution. In the construction trades, painters are exposed to the fumes of paints and solvents and roofers are exposed to coal, tar pitch and asphalt fumes, as well solvents. Tile setters, plasterers, cement masons, carpenters and bricklayers are all exposed to mixtures and epoxies from which toxic fumes, dust and mist can evolve. Laborers handle bags, barrels, boxes, cans, drums, cylinders and other containers which may contain hazardous substances. Iron workers, pipe fitters and plumbers, cut, weld and heat materials coated with paint and anti-corrosive materials that release toxic vapors. All crafts on a construction site can be exposed to airborne toxic contaminants. Pick any craft in the building and construction trades and you will find a group of construction workers that has potential exposure to these toxic substances.

The details of the triggering in of other toxic processes in the compensation scheme have been described in detail by the Industrial Union Department testimony. I would only say that the proposal represents an effort at recognizing the scientific problems involved in determining causation of occupational disease while recognizing the need to provide a remedy for those suffering from such exposure.

My testimony and statement before this Committee on previous occasions concentrated on the financing mechanism needed to pay for compensation proposal. The funding process of any occupational disease legislation is important to us because construction is an occupation with a high degree of mobility. We recognize that most of our members will work for many and different employers during their normal careers. To address the mobility problem for other concerns, our industry long ago set up multi-employer health and pension funds.

Given the long latency periods and multiple exposure problems associated with occupational disease, it was essential to have a financing system that fairly compensates the workers but does not place the entire cost burden on the last employer who may have a minimal involvement.

This inherently unworkable reliance on finding individual employer responsibility makes it highly unlikely that present state compensation systems will be able to respond to the occupational disease claims of the future.

We also have a concern that the American public should not have to pay for workplace disability caused by exposure to toxic substances. We recognize that there are situations where the federal government may in fact be involved in the manufacture or process of a toxic substance and may have to bear its share of the compensation costs. Indeed, with respect to its won employees' exposure to asbestos the federal government has assumed responsibility to pay compensation to many thousands of workers under the Federal Employees Compensation Act.

However, the responsibility for compensating the workers and their families made ill through cumulative exposure to toxic materials and substances should be placed squarely on those who are resonsible for the harm, and that is the employers and the manufacturers.

The compensation mechanism proposed by H.R. 3090 would provide just such an approach. That mechanism creates a trust fund that would be organized and regulated by the Secretary of Labor. It provides for the Secretary of Labor to set contribution rates and to operate the fund for employers and manufacturers.

Because of latency and multiple exposure factors we believe it appropriate that a compensation fund be created to address this problem of mobility and multiple employer responsibility.

The compensation mechanism proposed by HR. 300 would provide must such an apaproach. That mechanism creates a trust fund that would be organized and regulated by the Secretary of Labor. It provides for the Secretary of Labor to set contribution rates and to operate the fund for employers and manufacturers.

This proposal will enable individual claimants and employers to deal in a rational fashion with a compensation problem that goes beyond the capacity of any one employer or any one individual. Such a pooling arrangement will avoid mortal combat with employers or carriers that many claimants find as a result of filing under existing law.

Mr. Chairman, the problems sought to be cured by this legislative proposal are not easy ones. Previous witnesses have presented reasons why they believe the science embodied in this bill is not appropriate. We believe there is more than sufficient support in the scientific community for the process set forth in this bill.

Others have argued that the funding mechanism is unclear; and still others believe that it is too costly. We believe that the proposal for a Federal fund is an important and innovative approach warranting careful consideration by this Committee with refinements as required.

We hear about the costs to industry and the costs of insurance to take care of workers who are hurt or made ill on the job. But, we fail to understand the tremendous cost to the workers and to their families. The pain and suffering is incalculable. The economic costs are catastrophic for those who are made ill or who die from exposure to toxic substances. More than three quarters of a century ago our nation embarked on an effort to take notice and care for those who are injured in the workforce. We have to confront these issues and we have to move forward. It is now time to move forward and turn that dream into a reality.

Thank you!

Mr. MURPHY. And then we have with us as then the first speaker this afternoon, Mr. Howard Samuel, president of the Industrial Unions Department of the AFL-CIO.

Mr. Samuel, thank you for joining us.

STATEMENT OF HOWARD SAMUEL, PRESIDENT, INDUSTRIAL UNIONS DEPARTMENT, AFL-CIO

Mr. SAMUEL. At the outset, let me state that we strongly support H.R. 3090, the Federal Occupational Disease Compensation Act of 1985.

We believe that this legislation will finally begin to provide a measure of economic justice to the tens of thousands of workers victimized by occupational disease in the United States.

I wonder, Mr. Chairman, if I could interrupt myself. I realize we have not introduced to you two of our colleagues who are with us, because I had not expected to be the first speaker. It took me by surprise.

On my far right is Don Elisburg, former Assistant Secretary of Labor, and counsel both, I think, to the building trades and to the Industrial Union Department.

And on my left is Sheldon Samuels, the director of occupational safety, health, and environment for the Industrial Union Department.

The gentleman on my right you already know, and he will be following me as a speaker.

I hope I can submit my total testimony for the record, with your permission, and summarize.

Mr. MURPHY. Without objection, your entire testimony that you submitted to us yesterday will be admitted.

Mr. SAMUEL. Fine. I will resume.

We believe this legislation will finally begin to provide a measure of economic justice to the tens of thousands of workers victimized by occupational disease in the United States.

It's a good bill. It's a reasonable bill. It's a well-thought-out bill, and it should be expeditiously considered by this committee and the Congress.

In fact, unusually so, this is the first occupational disease compensation bill that has the complete, unqualified, and wholehearted support of the labor movement. And we commend Representative Pat Williams for his work on this legislation.

And what I will do is very briefly outline the basic principles on which H.R. 3090 is based.

The first principle—and these, we think, are key principles in the bill—is the need for a Federal program.

After more than 13 years of study and debate, we are convinced that individual States cannot and will not effectively compensate workers for occupational disease. While the reasons for this are many, the simple fact is that less than 10 percent of all occupational disease cases are compensated by State workers' compensation programs.

Of those 10 percent that are compensated, approximately 10 percent must first be litigated over the basic issue of compensability. To move from this situation to where a nation like ours should be—adequately compensating the 1 million or more Americans disabled every year by occupational diseases—requires a national approach at the Federal level.

The second principle of H.R. 3090 is the need for presumptions regarding causation of occupationally related disease.

As most occupational health professionals will testify, it is often impossible, except in very rare cases, to identify a specific hazardous exposure and link it mechanically and certainly with a specific disease. Indeed, most occupational diseases result from repeated exposures to different substances over a long period of time.

In this sense, most occupational disease are multicausal in nature and have long latency periods.

Most State laws, however, require claimants to demonstrate a direct cause and effect relationship which in most cases is difficult if not impossible.

Thus, we believe that claimants should have an initial presumption of disease if they can demonstrate that they are or were in a population of workers with a scientifically demonstrated increased risk of disease and were exposed to the hazard in question for the period of time necessary to increase their risk.

The third principle is creating a mechanism for compensating other, nonasbestos diseases.

While there is an immediate need to establish a compensation program for asbestos victims, there are other occupational disease victims that have the same or similar needs, and, therefore, reform legislation must, at a minimum, provide a means to include other occupational diseases.

As you know, H.R. 3090 provides for an administrative process whereby additional diseases can be made a part of the Federal Compensation Program.

The fourth principle underlying this bill is that workers should retain their traditional rights to sue responsible third parties who contribute to their disease.

However, in recognition of complications and legal requirements associated with such suits, we believe that third-party damage awards should be offset, dollar for dollar, by the total value of the compensation award. Such a provision would substantially relieve the incentive to file such suits, unless, of course, the damage done was so egregious that it warranted additional compensation.

All of this presupposes an adequate level of benefits available from the Federal program, something that is provided by H.R. 3090.

Finally, we believe that the dimensions of the problem are such as to require a fully adequate funding mechanism.

We, therefore, support the public approach adopted in H.R. 3090, which creates the exclusive Federal insurance fund that requires covered employers and others to purchase insurance from the Federal fund to cover their liabilities.

There is nothing new or novel about this approach. For example, some States operate exclusive State workers' compensation funds, and the Federal Government has long administered a number of different insurance programs covering banks, home mortgages, floods, and other activities.

These are the five basic principles which we believe are necessary for a reasonable and humane compensation program.

To its credit, H.R. 3090 incorporates these principles in a workable and realistic manner. We recommend the bill to you and look forward to its expeditious consideration.

Thank you.

[Prepared statement of Howard D. Samuel follows:]

PREPARED STATEMENT OF HOWARD D. SAMUEL, PRESIDENT, THE INDUSTRIAL UNION DEPARTMENT, AFL-CIO

Mr. Chairman, members of the Subcommittee. My name is Howard D. Samuel, and I am the President of the Industrial Union Department of the AFL-CIO.

At the outset let me state that we strongly support H.R. 3090, "The Federal Occupational Disease Compensation Act of 1985."

We believe that this legislation will finally begin to provide a measure of economic justice to the tens of thousands of workers victimized by occupational disease in the United States.

This is a good bill. It is a reasonable bill. It is a well thought-out bill and it should be expeditiously considered by this Committee and the Congress.

Indeed, this is the first occupational disease compensation bill that has the complete, unqualified and whole-hearted support of the labor movement, and we commend Representative Pat Williams for his work on this legislation.

As you well know, Mr. Chairman, this is not the first time we have been before your Committee on this issue. As a matter of fact, we have appeared a number of times over the 13 years since the National Commission on State Workers' Compensation Laws concluded in 1972 that state workers' compensation programs were both inadequate and inequitable.

Little has changed since 1972. Nowhere are the inadequacies more apparent than in the area of occupational disease compensation. The overwhelming majority of workers disabled by occupational disease get absolutely nothing from the state workers' compensation systems. The tiny minority that is compensated receive very low awards and then only after long delays and legal challenges.

For the record, Mr. Chairman, I would like to resubmit previous IUD testimony on some of the many problems associated with occupational disease, its relationship to hazardous occupational exposures and the inadequacies of the existing occupational disease compensation system. Rather than take the time to reiterate the points made previously, I would simply like to have that testimony made a part of this record.

What I will do—very briefly—is outline the basic principles on which H.R. 3090 is based.

The first principle is the need for a federal program. After more than 13 years of study and debate, we are convinced that individual states cannot and will not effectively compensate workers for occupational disease. While the reasons for this are many, the simple fact is that less than 10 percent of all occupational disease cases are compensated by state workers' compensation programs. Of those 10 percent that are compensated, approximately 90 percent must first be litigated over the basic issue of compensability. To move from this situation to here a nation like ours should be—adequately compensating the one million or more Americans disabled every year by occupational diseases—requires a national approach at the federal level.

The second principle of H.R. 3090 is the need for presumptions regarding causation of occupationally related disease. As most occupational health professionals will testify, it is often impossible except in rare cases, to identify a specific hazardous exposure and link it mechanically and certainly with a specific disease. Indeed, most occupational diseases result from repeated exposures to different substances over a long period of time. In this sense, most occupational diseases are multi-causal in nature and have long latency periods. Most state laws, however, require claimants to demonstrate a direct cause and effect relationship which, in most cases is difficult, if not impossible. Thus, we believe, that claimants should have an initial presumption of disease if they can demonstrate that they are or were in a population of workers with a scientifically demonstrated increased risk of disease and were exposed to the hazard in question for the period of time necessary to increase their individual risk. H.R. 3090 establishes such presumptions for asbestos-related diseases—the occupational diseases which are initially compensated under the bill.

The third principle is creating a mechanism for compensating other, non-asbestos diseases. While there is an immediate need to establish a compensation program for asbestos victims, there are other occupational disease victims that have the same or similar needs and, therefore, reform legislation must, at a minimum, provide a means to include other occupational diseases. As you know, H.R. 3090 provides for an administrative process whereby additional diseases can be made a part of the federal compensation program.

The fourth principle underlying this bill is that workers should retain their traditional rights to sue responsible third parties who contribute to their disease. However, in recognition of complications and legal requirements associated with such suits, we believe that third-party damage awards should be offset, dollar-for-dollar, by the total value of the compensation award. Such a provision would substantially relieve the incentive to file such suits, unless, of course, the damage done was so egregious that it warranted additional compensation. All of this pre-supposes an adequate level of benefits available from the federal program, something that is provided for by H.R. 3090.

Finally, we believe that the dimensions of the problem are such as to require a fully adequate funding mechanism. We, therefore, support the public approach adopted in H.R. 3090 which creates the exclusive federal insurance fund that requires covered employers and others to purchase insurance from the federal fund to cover their liabilities. There is nothing new or novel about this approach. For example, some states operate exclusive state workers' compensation funds and the federal government has long administered a number of different insurance programs covering banks, home mortgages, floods and other activities.

These are the five basic principles which we believe are necessary for a reasonable and humane compensation program. To its credit, H.R. 3090 incorporates these principles in a workable and realistic manner. We recommend H.R. 3090 to you and look forward to its expeditious consideration.

Mr. **Murphy**. Thank you very much, Mr. Samuel.

Mr. Denison.

STATEMENT OF RAY DENISON, DIRECTOR, DEPARTMENT OF LEGISLATION, AFL–CIO

Mr. **Denison**. Thank you, Mr. Chairman.

First of all, thank you for your kind words in connection with the resolution of the Garcia matter. And certainly your efforts were instrumental in bringing that about. It was a long, arduous task, but a very successful conclusion, and we're pleased.

If I may, I'll read my testimony.

And, as you indicated earlier, the testimony by Robert Georgine being made a part of the record, I will not attempt to go into that other than to say that the testimony does, as my testimony and that of Mr. Samuel, indicate full support for H.R. 3090.

Mr. Chairman and members of the committee, the AFL–CIO is very pleased to appear today in support of H.R. 3090, the Federal Occupational Disease Compensation Act of 1985.

Workers' compensation is the oldest form of social insurance in the United States. It is clearly in need of reform. The AFL–CIO has been an advocate for improvement for many years. Unfortunately, the conglomeration of State laws that provide disparate levels of protection, especially in the area of occupational disease, is clearly inadequate to the needs of working men and women in today's industrialized economy.

At the Federal level, we have urged that Congress enact Federal minimum standards for the present State-controlled workers' compensation system.

At this time, however, we are focusing our plea for reform on the issue of occupational disease.

In America, occupational disease is of epidemic proportions. On-the-job exposure to toxic substances, already identified as workplace hazards, is taking a grim toll in disability and death.

In many appearances before this and other committees of Congress, the AFL-CIO has presented detailed evidence of this workplace scourge.

Scientific reports show that one out of every four blue-collar workers will die from occupationally related cancers. It is estimated that 25 million workers are exposed to harmful substances. Of these, 11 million workers are exposed to some 2,400 known or suspected cancer-causing substances or processes.

It is estimated that 200,000 deaths will occur from asbestos alone by the end of the century.

Thousands of workers are disabled by brown lung and by exposure to other toxics in virtually every industry.

Workplace substances also bring about nervous system disorders, reproductive harm, and a host of other potential health problems.

At the just concluded AFL-CIO convention, the delegates unanimously adopted a resolution on workers compensation, which said, in part:

> The AFL-CIO believes that the first step in this process of workers compensation reform should be the enactment of a comprehensive Federal program to provide compensation to occupational disease victims and those who are disabled as a result of occupational exposure to toxic substances. Such a program would embody the traditional workers compensation concept of exclusive remedy with one exception. Companies should not have the shelter and protection of exclusive remedy when occupational illnesses related to toxic substances are the result of willful and intentional misconduct. The severity of the occupational disease problem in the United States requires that every means of encouraging preventive action be employed—including the deterrent effect of possible legal action.

And we went on to say:

> The AFL-CIO also urges Congress to enact the High Risk Occupational Disease Notification and Prevention Act. This program would establish a system for identifying, notifying, counseling, and medically monitoring workers who are at high risk of contracting an occupational disease due to exposure to toxic substances at the workplace.

The AFL-CIO support for high risk notification legislation was made known in the joint subcommittee hearings of this committee yesterday.

Mr. Chairman, we believe that H.R. 3090 embodies the needed elements of a Federal occupational disease program.

The bill recognizes the need to provide comprehensive coverage of workers who become ill or die from toxic exposurers. Dependents who are affected by such exposure are also included.

The bill provides benefits that would enable the worker, dependent, or survivor to have full medical treatment and an adequate income level.

H.R. 3090 contains a claims process and appeals procedure that would enable the claimant to receive these benefits without having to run an impossible administrative gauntlet.

The bill addresses the immediate problem of asbestos victims by recognizing that such diseases as mesothelioma, lung cancer, and certain other cancers are due to asbestos exposure and are compensable.

The bill also provides a mechanism for covering additional diseases through a trigger and rulemaking procedure under the direction of the Secretary of Labor. This procedure includes provisions for awarding compensation based on scientifically determined criteria that exposure to certain toxic substances and processes in the workplace caused the disease. These presumptions and a mechanism to include exposures to toxic substances and processes beyond asbestos are essential elements of this legislation.

Sound financing of an occupational disease compensation program is a major requirement for success. This measure created a Federal compensation insurance fund to provide for medical and income benefits to claimants.

This bill also permits workers to retain their common law rights to sue responsible third parties.

The relationship between workers and their employers that gives rise to the no-fault provisions of a workers' compensation statute must be viewed separately from that of manufacturers who traditionally have been considered outside of that relationship.

However, there is a dollar-for-dollar offset against any court award. This offset should serve as a disincentive to sue without just cause. We expect that workers who have been genuinely injured should gain confidence in the superior benefits provided under this bill and over time reduce their primary reliance on the tort system for recompense.

Several of these issues are dealt with in further detail in the accompanying testimony from the Industrial Union Department and the Building and Construction Trades Department.

Mr. Chairman, the physical suffering and economic impairment brought about by workplace disease is now borne totally by its victims. In addition to severe pain and suffering, worker-victims are exhausting their life savings for medical care and to replace lost income.

Employers are not fairly paying for the costs of the occupational disease they inflict. Instead, many employers spend millions of dollars in legal fees to resist health standards that would prevent tragedies, such as asbestos, from striking the next generation of workers. Employers spend additional millions of dollars to defend State workers' compensation programs that their own studies have demonstrated are inadequate.

The evidence of this problem is real. One has only to pick up a newspaper, read a magazine, or turn on the TV to find stories of toxic exposures in the workplace.

We believe that now is the time for the Federal Government to establish a fair, humane, and responsive national compensation system to deal with this growing national crisis, and we believe that H.R. 3090 is the appropriate vehicle with which to proceed.

We stand ready to work with you, Chairman Murphy, and with the committee to move this vitally needed legislation forward with dispatch.

Thank you.

Mr. MURPHY. Thank you very much, Mr. Denison.

I understand that Attorney Elisburg and Mr. Samuels are supporting cast today. That's right. You don't have any direct testimony.

Thank you for also being with us.

One question I have, as you're well aware. In fact, I think you have both testified before the joint hearings by the Health and Safety Subcommittee and my own on H.R. 1309. And both of us have heard the same testimony that there is a problem in determining a direct relationship between the disease and a substance that causes the disease, and that more studies are needed. There's not sufficient evidence.

Do you have anything to add to what you've already told us in that regard?

Mr. DENISON. I don't have any.

Mr. SAMUEL. Could I suggest Sheldon Samuels, who is an expert in this area?

Mr. MURPHY. Yes.

Mr. SAMUEL. He would be able to answer this very well.

Mr. SAMUELS. The method in Congressman Williams' bill is the one method which scientists seem to have some agreement about.

The studies in epidemiology relating to the excess risk of disease in a particular population exposed to a toxic substance or process—it isn't necessarily a single agent—focus on a figure of 20 percent as a reasonable presumption of causation. Because at that level of observed effects among the exposed population, measured against expected effects in a normal population, most epidemiologists believe that well designed and conducted studies identify a causative factor to explain the excess in the first place.

The bill, as I mentioned, introduced by Congressman Williams, calls for a presumption of causation for the individual where the excess risk is 30 percent. We've accepted that figure as appropriate, even though it's a conservative one as compared to the generally accepted scientific standard.

Now, why must a presumption be made? There is not one way of looking at a population of sick people, in most cases no matter what the disease, and say I know the single cause by which this person contracted that disease.

Lung cancer is lung cancer. It is hard to say that even though the person was exposed to asbestos or not exposed to asbestos that that single agent is what triggered off a process beginning in one cell out of billions of cells in our bodies that results in that disease.

So, we need, in going from the population where we've established causality to the individual, to make some presumptions. And it's at that level of reviewing that case where very important information to interpret causation at the individual level becomes very important.

For example, the number of years a worker was at a certain job where asbestos existed, or the levels of asbestos exposure, et cetera.

Mr. MURPHY. Thank you. That's very good.

Would you support a Federal contribution toward the payment of asbestos-related claims?

As you know, I have espoused the fact that the Federal Government was largely responsible in the 1930's and the 1940's for the distribution of the product. And I wonder what your feeling might be on that.

Mr. **Denison**. I think our feeling on that would be that where the Federal Government is an employer it has the same responsibility as any other employer. And also where the Federal Government——

Mr. **Murphy**. Well, now, let me stop you there, Ray.

Would that mean then that the Government should be in the relationship of an employer and not a third party, and, therefore, limit it to claims under FECA or whatever the case may be?

Mr. **Denison**. Well, they would be contributing, as I would see it, the same as where you do have separate situations involving Federal employees currently.

But going back to the situation where the Federal Government was involved as a direct employer, then, in that instance, if there is a claim, if there is an affliction, a disease, then, yes, we would expect a Federal contribution in that regard, such as any other employers.

But also if—we would even be willing, I guess, to stretch it somewhat where there's a situation where certain acts are undertaken at the behest of the Federal Government, under certain shipyards, for example. And I think that's a common example, where they're building under certain requirements, and a great deal of asbestos is used.

Mr. **Murphy**. I see.

Mr. **Denison**. But to say——

Mr. **Murphy**. But in some of those instances the Government was the controller, or supplier, or requester, or it was not the direct employer. It was private employment, you know. It would be so-and-so shipyard or company.

Mr. **Denison**. I think there's a role there for the Federal Government. Just whether it's the same as if they were the sole employer or as any other employer, I'm not sure. But certainly a role.

Mr. **Murphy**. I see.

Mr. **Denison**. But we would not feel at this moment that there should be a Federal contribution per se to any fund of any percentage of any nature, but rather this should stand on its own feet as any other worker compensation.

Mr. **Murphy**. I see.

Thank you.

Mr. Petri.

Mr. **Petri**. Thank you.

Just one or two questions.

I thought I heard in the testimony, but I couldn't find out looking back through it, if there was an estimate at all as to the number of job related claims that might be out there each year.

There was a figure that said 90 percent go uncompensated, and only 10 percent get compensated. But 90 percent of what?

Mr. **Samuel**. Of occupationally—90 percent of occupationally related disease——

Mr. **Petri**. And how many are——

Mr. **Samuel** [continuing]. Are not compensated.

Mr. **Petri**. Do you have the actual numbers?

Mr. **Samuel**. The absolute numbers?

Mr. **Petri**. What is the 100 percent, and then 10 percent?

Mr. **Samuel**. I'm not sure. Let me ask Mr. Samuels. He has actual numbers.

Mr. **Samuels**. If you were to—not to look at all of the numbers. Let's take one significant number. The rate of disability related specifically to conditions of work and occupational disease.

The Department of Labor, in a study by Dr. Glen Schor, has established that there are about a million cases out there.

Now, of those million cases, only a very small percentage—one Labor Department report —said 5 percent, another one said 10 percent, we're using the most conservative figure of 10 percent —are ever compensated.

Most of those cases, by the way, that are finally compensated are for dermatitis and other diseases that are very clinically obvious.

Mr. **Petri**. So, in round figures, you estimate something in the nature of a million claims a year? I mean cases a year.

Mr. **Samuels**. There, I don't know about the number of claims.

Mr. **Elisburg**. I don't think those figures were necessarily per year. That was a study over time that there were something like a million cases out there, of which maybe 10 percent had somehow gotten somewhere into the State systems.

I think that is——

Mr. **Petri**. I'm just trying to relate to the figure. Because the idea seems to be that there's a very small number of people who are getting any kind of reasonable handling of a claim, but I don't know how many that really is, or whether people are even filing claims.

Ten percent of the total cases are getting compensated. But what percentage of those who go ahead and file a claim are getting compensated?

For example, it could be that most people that do have a skin rash or something else that may be job related don't feel it's worth filing a claim.

Or, on the other hand, it could be that people are dropping dead before they could get a claim in.

I just don't have any ideas what the real world situation is.

Mr. **Denison**. Or they're told that there's no point in filing a claim.

Mr. **Petri**. Yes. Whatever.

Do you have any breakdown at all on this? I guess we could go ahead and go through it, if we wanted to, later on to establish a better record for the need for this.

Mr. **Elisburg**. Well, there have been a number of different studies on this. I think it would probably be better for us to try to provide it for the record. Because it does involve studies that NIOSH made, studies related that the Department of Labor undertook at several different occasions, studies that relate to the number of people who are filing each year for Social Security disability, who, in fact, ought to be, in effect, compensated under a workers' compensation program. And it would probably be better to submit to you some sampling of those studies.

Mr. **Petri**. Yes.

Do you have any estimates yourself as to the cost of operating such a system once it gets going?

BEST COPY AVAILABLE

If there are a million claims, and they're getting two-thirds of wages, that would be roughly, at the maximum, I suppose, something like $15,000 per claim per year. But presumably they wouldn't all go on for a number of years.

Although if you are adding a million a year, it would be a program going up at $15 billion a year, plus administrative costs.

Mr. **Samuels**. I wonder if I—I can't directly answer the question. Let me just ask you to qualify the question.

I don't think that there are a million claims. There are a million cases out there, only a small portion of which are ever compensated.

You are right, as others have said, that most of these cases are never filed for, in part because the worker doesn't know.

In hearings which you sat in yesterday——

Mr. **Petri**. Yes.

Mr. **Samuels** [continuing]. We discussed that.

There's no way for them to know.

Mr. **Elisburg**. I also think that if you're looking for ballpark it's very clear that workers' comp traditionally has run about 2 percent a payroll. That's what it is. And I think that there's no reason to suggest that those percentages would dramatically change by having an effective occupational disease compensation system.

Mr. **Petri**. One other area. I just raise it because it is of some concern. Did you discuss and, if so, why did you decide not to include any sort of presumptions not only of responsibility of the employer in the case of exposure of 1 year, or 5 years, or 20 years, or whatever, but of responsibility of the employee for a portion of it if they're, for instance, smoking and dealing with asbestos, or drinking and having some other types of exposures perhaps, or whatever?

The medical evidence is pretty clear. And there are lawsuits going on now between the tobacco companies and the asbestos companies because they feel that it's clear enough that both those exposures contribute to contraction of the disease. And you can argue about exactly which is the chicken and which is the egg and so on.

But clearly the responsibility for smoking is not as easily laid at the doorstep of the employer or of society as on the back of the individual who makes a decision to become a smoker him or herself.

So, we're going to be creating a system of social compensation to reimburse people for individual choice. And do we want individuals to be able to saddle society with the costs of that choice?

Wouldn't it be better to try to encourage people to assume or recognize some of that costs? And maybe it will help. It will give them some incentive to protect their own lives.

Mr. **Samuels**. Others may want to also address this issue. But I'd like to say that the question is a very, very good one. And I don't want to belittle it at all. And we've given this a great deal of thought.

We don't believe that exposure to toxic substances and processes that result in occupational disease should be subject to any form of apportionment.

We believe that there may be many lifestyle activities which, like other environmental and genetic causes, are shared by all of us that would subject a person to some form of increased risk of

BEST COPY AVAILABLE

cancer, for example, but that where there is a direct relationship of disease, such as exposure to asbestos and lung cancer, other factors should not be used to limit the employer liability.

For example, the fact that the risk of lung cancer is five times greater for persons exposed to asbestos has to be viewed in the context that the five factor increase in risk applies to smoker or nonsmokers alike.

Now, what does that really do to give us in terms of a bottom line? The bottom line is that workers' compensation is for the added burden of risk that arises from exposures in the workplace. It isn't for smoking. It isn't for riding to work every morning behind a bus that's using diesel fuel. It isn't because we don't eat green leafy vegetables. It's for the added risk that arises directly from the workplace.

And all of us are paying all of the other costs. The worker is never fully compensated. Whatever he receives through any legislation achieved by the Congress will only be partial reimbursement in any case.

Mr. **Petri**. Thank you.

Mr. **Murphy**. Thank you, Mr. Petri.

Mr. Williams.

Mr. **Williams**. Thank you, Mr. Chairman.

Mr. Petri put his finger on the tragedy, because of long latency periods, multiple exposure difficulties, and no legal recognition of presumption due to ineffective or nonexistent State protection for the victims of occupational disease, we don't know how many are out there.

That's the tragedy of it. We don't even know how many are out there.

And for people who tell me that, as industry did, when they came before our hearing on September 26, that we don't really know what the costs of this legislation would be should it become law, they are exactly right. We don't.

That has not prevented a good and caring society, however, from moving ahead and providing the types of protection to its citizens that they both need and demand.

That hearing on September 26 raised some questions which I'd like to pose to either of you gentlemen.

Some of the critics of the legislation, particularly with regard to the costs of the legislation, pointed out on several occasions during that last hearing that the legislation would become far too expensive if, indeed, we trigger the coverage of diseases other than asbestosis.

Can you respond to the potential of that increased cost, Mr. Denison?

Mr. **Denison**. Well, of course, there will be, undoubtedly, increased costs. But I guess that's the problem. If you're going to look at an issue on the basis of cost benefit—and that's always been a concern of ours that we not look at suffering and social programs on the basis of cost benefit, because if we allow ourselves to be tied down by that bugaboo we won't enact very much.

But I think, as Mr. Elisburg indicated, that certainly 70 or 80 years ago when the first workers' compensation program went into effect the same question arose then—could we afford it—because of the illness—or rather the injury that takes place on the job. Won't there be malingering? Won't people deliberately fall down or break their legs so they can collect, and all such canards that one hears. And we went ahead, State-by-State, and built a program that works and, as Don illustrated, is about 2 percent of payroll.

We would think that once you get past the backlog of this, whatever that backlog is out there, then certainly the cost of the program should not be much more than an additional 2 percent. And this is a guess of course. But at least it's the only benchmark that we have.

And to say that because there's going to be a cost out there, we shouldn't proceed, flies in the face of the whole purpose of this going beyond asbestos itself.

But certainly the whole concept here of trying to use the insurance factors, spreading the risk, is beneficial to the employer as well, because if one employer should be devastated, and many face that now as a result of asbestos, for those companies can fail, and the employees lose their jobs, an insurance pooling system protects them all from that disaster and preserves the employer, the place of business, and the job.

So, it has an upside, too, that we're going to face at some point, whether we face it in the courts or we face it in this system.

Mr. **Samuel**. Could I add a word to that, what Mr. Denison has said?

Mr. **Murphy**. Please, Mr. Samuel.

Mr. **Samuel**. And I fully agree with everything he has said.

It seems to me that we also should be very sensitive to the fact that by not doing this there are considerable costs. Not passing a bill does not free society of costs.

The trouble is that today we are bearing those costs of illness and disease, but society as a whole is paying the price. And those who have caused the problem, which are basically the manufacturers who have these inadequate technologies in their plants, are not.

It seems to me that the public through public welfare, public health, and other kinds of payments are taking care of the problem now, as well as, of course, the tremendous number of tort cases.

It is assumed, I think, that with a good compensation system you would have a considerable reduction in tort cases if the compensation system is adequate. So, those costs could be reduced as well, even to employers.

So, it seems to me we're really trading costs. We're trading, removing the burden from society as a whole to putting more of the burden on where it belongs.

Mr. **Williams**. I think, Mr. Chairman, that Mr. Samuel and Mr. Denison make a critical point here. And that is that the costs now exist. The question is, how shall they be borne? Shall they continue to be borne by the victim, by the public through its payments, such as Social Security? And when the cases are finally brought through tort law, should the costs continue to be borne by only a few companies who find themselves bankrupt because suddenly, the costs are placed directly on them?

This legislation seeks to find the mechanism to move those costs into the production end and, thus, spread more fairly across society and industry.

BEST COPY AVAILABLE

Mr. Samuel, traditional compensation bills, as you know, provide coverage to the injured worker.

My bill has received some criticism because we include the dependents of those workers as among those who are covered.

I've appreciated your good support of this legislation, and inquire of you as whether or not that portion of the bill is part of the main reason for your support.

Mr. **Samuel**. I think it is, Mr. Williams. And I think it's a very useful part of the bill. It recognizes the fact that occupational disease, unlike most occupational accidents which affect a limb, or a finger, or something else, may be spread from the immediate victim, the worker, to his family.

We know, of course, already there's enough scientific evidence to show that asbestos can be conveyed from the immediate victim to his family very rapidly, and other diseases as well. I think lead, mercury, and so forth, other kinds of poisoning can move very quickly from one member of the family to another.

So, in this particular area of occupational disease, giving protection to the members of the family is just as important as covering the immediate victim as well.

Mr. **Williams**. I want to express to both of you and to your colleagues my thanks for your endorsement of this legislation and the assistance that your offices provided to me in helping to draft the legislation in a way that would make it acceptable to America's workers.

Now, neither labor nor management should underestimate the importance of legislation on this critical subject which has the endorsement of America's workers. Because, as the chairman knows, legislation does not begin to move in this Congress, until legislation has been dropped in the hopper that has the support of America's workers. Because, at that point, we can begin to negotiate, to seek to measure the various proposals, one against the other, and come up with a timely solution.

And, as you gentlemen know, this marks the first time that the workers in America, through their elected representatives, have said now there is legislation which we can support, and so this matter should go forward to a resolution.

So, your support is critical to both the workers and the industry so that we can begin to resolve this matter which so needs resolution if the workers and the industry are to be appropriately protected.

Thank you, Mr. Chairman.

Mr. **Murphy**. Thank you, Mr. Williams.

I particularly appreciate you gentlemen being here this afternoon, when I have just been advised that on the Senate floor is a matter in which you have some mild interest.

There was a motion to delete the language reversing Davis-Bacon coverage from the Military Construction Appropriation Act. And that motion to remove the language was carried by a vote of 49 to 45.

Davis-Bacon will not now be coming to the House in that appropriation bill, I hope.

I have one final question.

It gets back to my other response and my desire to have the Government wrapped up in this. We talk about having the responsibility fall on the industry where it lies. And, of course, that has historically been our position, I think, that of Congress and that of organized labor.

But as we are faced in today's economy with the loss of so many jobs and, allegedly, the cost of labor on those jobs, I wonder. And that is what has caused my thinking on the asbestos matter. I wonder if you can't rethink or offer some thought to the fact of spreading out the loss, spreading out the loss to the entire populace.

We want the goods produced in America. We want the industries located in America. We do not want to lose them because there are loose labor and safety practices somewhere else in the world. We wish we could legislate the industrial climate of the world, and that would not happen.

But until that happens, until the rest of the world catches up, is there not some system you can conceive that would spread out the loss to the general public, retain the industry here, protect the worker, and not have the burden fall in one area? And am I wrong in that thinking maybe, perhaps, because of my desire to protect American jobs?

Mr. SAMUEL. No. I think you're not wrong at all, Mr. Chairman. And it's a subject that's bothered us as well, because it's our members who are losing the jobs of industries impacted by events abroad and the competition we face.

I guess I'd have a couple of answers. First of all, we are, of course, only imposing a partial cost on manufacturers in this case. Workers are going to be getting just a partial benefit. And certainly there's no way any system can be devised which fully compensate workers for the loss they, their families, and communities suffer. So, it is a fairly minimal program at best, and we recognize we can't do very much more than that.

There's still going to be a considerable burden borne by the victim and by the community in areas where the Federal compensation system simply doesn't cover it.

You made one statement, which, unfortunately, is true at present. But I wonder if we couldn't look forward to a better day. You mentioned that we can't legislate conditions abroad in those companies which are competing with us in those countries.

There was the Trade Bill in 1984, which included the renewal of the generalized system of preferences and the Pease amendments to that renewal, which does require us, at least in this limited area, or at least allow us to restrict GSP benefits to our competitor to those countries which observe generally accepted, internationally accepted standards in relationship to labor.

And it seems to me, if the Congress and the executive department make sure that those amendments are observed and implemented properly and enthusiastically that we can indeed begin to make some progress in imposing, if that's the right word, or at least encouraging somewhat higher standards in regard to health and safety among our trading partners.

Mr. MURPHY. Thank you.

Mr. **Denison**. The only addition I might make to that, Mr. Chairman, is that, as you are aware, there is the Wellington Process in process now, if I can use that term. And it might be well for us to watch that process and see how the claims handling and the resolution of that comes about. And we may find that through that process a lot of this area—a lot of the concern in this area as to cost will be allayed. And that will be an interesting exercise to watch as it moves along. And that may allay all of our concerns.

Mr. **Murphy**. I might say for your information that we will be happy to share that information with you.

We are going to be meeting with the people who conceived that concept and how it is being managed just as a matter of extracting from them how does it work and is it working.

Mr. **Denison**. We'd appreciate it. They told us about it.

Mr. **Murphy**. I see.

Mr. **Denison**. We were not participants in it, but we're very interested.

Mr. **Murphy**. Well, we are not either. But I do not know whether the Government should become a part, whether it can become a part of it.

But we would like to interrogate them to see how it is working, if it is working.

Any further questions, gentlemen?

[No response.]

Mr. **Murphy**. Thank you very much, gentlemen, for being with us this afternoon.

[Whereupon, at 2:17 p.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

PREPARED STATMENT OF NATIONAL EDUCATION ASSOCIATION

Mr. Chairman: The National Education Association (NEA)—with 1.7 million members who are this nation's public school teachers, education support personnel, and higher education faculty—supports H.R. 3090, the Occupational Disease Compensation Act of 1985, as an important step in employee protection rights as they pertain to occupation-related diseases. Its greatest strength is that it provides coverage to all employees—public and private alike—under an insurance fund to compensate workers or their survivors for asbestosis or other occupational diseases. H.R. 3090 offers particularly important protection for public sector employees, who are not even included in coverage under the far-from-adequate standards of the Federal Occupational Safety and Health Act.

Hundreds of thousands of NEA members who serve as public education employees are exposed to asbestos. Indeed, the Environmental Protection Agency (EPA) itself found that 1.4 million school employees are exposed to asbestos hazards. Particularly at risk are NEA's 80,000 education support personnel. Many of these school support personnel are employed in maintenance positions, which often present occupational health risks related to work on asbestos containment and removal in the schools.

Asbestos—The silent killer

Asbestos is one of the most toxic pollutants in our atmosphere. Roger Wilmoth, Acting Chief of the Environmental Protection Agency's Nonferrous Metals and Minerals Branch, said last year:

"I feel asbestos is the pollutant of the century. Because of past exposures, an estimated 10,000 persons will die each year until the year 2000 from asbestos-related illnesses."

Asbestos-related diseases include mesothelioma, lung cancer, asbestosis, and/or gastrointestinal cancers—all of which are fatal. Asbestos presents our nation with a full-fledged public health crisis. It is one affecting people in workplaces throughout the nation. Our schools have not been immune from this epidemic since asbestos was commonly used in school construction during the 1950s and 1960s. Because of this crisis, and the millions of school children and school employees who are at risk, the NEA has been in the forefront of attacking asbestos problems through action at the local, state, and federal levels. This work includes:

Publication of a handbook, "Asbestos in Our Schools: Taming the Silent Killer," which has been distributed to all 12,000 NEA local associations;

Development of a survey to determine how many school districts have asbestos problems, also distributed to all NEA local affiliates;

Work with Congress to pass and fund the Asbestos School Hazard Abatement Act (ASHAA); and

Participation in the regulatory process with the Environmental Protection Agency (EPA).

Survey results show problems widespread

The NEA survey on asbestos contamination in the schools was distributed earlier this fall. Based on preliminary information from nearly 400 school districts, a number of alarming facts emerge:

Roughly a third of the nation's 87,000 school buildings have asbestos problems;

Districts are relying too much on school maintenance employees and custodial workers who are often inadequately trained and protected to inspect for, and in some cases remove, asbestos;

Classrooms are the least contaminated areas, while gyms, auditoriums, music rooms, and behind-the-scenes areas where maintenance and custodial personnel work (heating and cooling plants, for example) are the most contaminated.

These survey results become all the more alarming given the fact that even minimal exposure to asbestos can be fatal. The great danger of asbestos poses two imperatives. School districts should use only qualified asbestos removal firms, or should adequately train and protect their own employees who may perform such work. And if school district employees perform such work, they must be given some form of recourse if their health and livelihood are affected by this dangerous work.

In addition, it is clear that while asbestos may be the most hazardous of the toxic substances to which NEA education support members are exposed, it is certainly not the only one. This is why NEA supported an amendment to the Hazardous and Solid Waste Amendments of 1984 which called for the EPA, in consultation with the federal Education Department, the states, and appropriate educational associations, to conduct a study by April 1987 on problems of hazardous wastes in schools and colleges.

Federal legislation—A good start

NEA believes that the time has come for the creation of a federal program to cover all workers afflicted with occupational diseases. NEA further believes that the product manufacturers should be held responsible for financing this compensation program.

All too often under state law, workers have been left unprotected, or faced with an enormous burden of proof, leading them to an administrative maze that thwarts their efforts at gaining just compensation. One highlight of H.R. 3090 is its call for presumptions regarding the case of an occupation-related disease. In establishing an initial presumption of disease for afflicted workers shown to be in an increased risk group, H.R. 3090 can save workers valuable time in processing cases. It can also help to ensure uniform compensation for those with similar occupation-related diseases.

NEA also agrees with H.R. 3090's call for the retention of workers' rights to sue responsible third parties who contribute to their disease.

Prevention the best response

In addition to calling for the Subcommittee on Labor Standards to adopt the Occupational Disease Compensation Act of 1985, the NEA has been working in conjunction with other Congressional Committees to prevent this public health crisis from harming even more innocent victims. In order to ensure this, NEA believes the Congress must:

Require all schools with hazardous asbestos to take appropriate abatement actions;

Require building occupant safeguards during asbestos abatement;

Establish procedures for disposal of removed asbestos; and

Require periodic reinspection where asbestos is not permanently removed, but is encapsulated or enclosed.

CONCLUSION

NEA is grateful for this opportunity to present its views on this important public health issue. We look forward to working with the Subcommittee as it moves forward on this bill.

PREPARED STATEMENT OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA ON H.R. 3090

The Associated General Contractors of America (AGC) represents more than 30,000 firms including 8,400 of America's leading general contracting companies which are responsible for the employment of more than 3,500,000 employees. These member contractors perform more than 80% of America's contract construction of commercial buildings, highways, industrial and municipal-utility facilities.

AGC appreciates the opportunity to present its views on the issue of occupational disease.

AGC believes that there is no need for new federal legislation applicable to occupational disease in the construction industry for the following reasons:

State laws presently provide for coverage of occupational diseases;

Injured employees are covered under the state law of the domicile of the employer or the state in which the injury occurs and the injured employee can pursue the claim in the state with the most advantageous state law.

AGC believes that the proposed Occupational Disease Compensation Act, H.R. 3090, is yet another example of federal over-reach. State legislatures are considering and enacting ever increasing protection for injured workers and accomplishing this where the responsibility belongs—at the state level.

AGC is concerned that enactment of legislation by Congress affecting workers' compensation would federalize a process that is best handled at the state level. Efforts to further improve state workers' compensation laws would be retarded by removing a part of the responsibility for workers' compensation matters from the state level where it is most responsive to the people affected by such compensation. Removing the responsibility through federal legislation that the states have for their own programs is a thinly veiled violation of states' rights.

AGC is also concerned with the movement toward federal legislation in the occupational disease area in light of the sparse documentation regarding the need for such legislation. Information about the causes, scope and definitions of occupational disease to date is generally inconclusive and mandates study instead of yet another federal program.

If the problem of occupational disease is significant, we are surprised that a groundswell effort for reform has not occurred at the state level where, presumably, such reform would be expected to be initiated. A report by the California Workers' Compensation Institute a few years ago, for example, noted that only 1.6% of claims filed involved occupational disease and that asbestos claims were less than .3% of all claims. It would seem that the small incidence of claims in this area hardly warrants yet another federal program.

The intrusion of the federal government in state workers' compensation programs is unwarranted particularly when an examination is made of the number of states and jurisdictions that cover occupational disease. Currently, all states and jurisdictions cover all occupational diseases including those diseases caused by exposure to asbestos. AGC questions whether workers, employers and the public interest will be well served by the addition of a federal function when effective state programs already exist to address the issue of occupational diseases.

The ramifications of any federal occupational disease legislation on the national economy would be profound particularly if it follows, as is likely, the course of the Black Lung Program. This program has grown from a temporary program estimated to cost less than a total of $90 million into a permanent program costing more than $2 billion annually. This proposed new federal program would disrupt underwriting, rate-making, availability and procurement of insurance coverage for workers' compensation. AGC questions the need for such a potential expense, particularly in the absence of a demonstrated need for such legislation.

For these reasons, the Associated General Contractors of America believes it is not in the public interest to create a new and unneeded federal program such as the proposal outlined in H.R. 3090.